

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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6 DETROY LIVINGSTON,
Plaintiff

08-CV-6576(G)

7 vs.

8 JAMES ESGROW, ET AL.,
Defendant.

Rochester, New York
October 23, 2013
8:30 a.m.

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11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE FRANK P. GERACI, JR.
13 UNITED STATES DISTRICT JUDGE

14 DETROY LIVINGSTON, PRO SE

15
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P R O C E E D I N G S

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(WHEREUPON, the jury is not present).

THE COURT: Good morning.

08:47:06AM **MR. BENITEZ:** Good morning, Judge.

THE COURT: Ready to proceed?

MR. LIVINGSTON: Yes.

THE COURT: Bring the jury out.

MR. LIVINGSTON: May I?

08:47:12AM **THE COURT:** Sure.

MR. LIVINGSTON: I was wondering if I could get a
read back from the last thing what he said and done.

THE COURT: Last testimony of Mr. Bills?

MR. LIVINGSTON: Yes.

08:47:31AM **THE COURT:** He was reviewing Exhibit No. 4.

Indicated it was received August 17. And you showed him the
envelope that had the date of July 26, '08, indicated it was
run through Pitney Bowes machine. And he did not know when it
was sent.

08:47:53AM **MR. LIVINGSTON:** Okay.

THE COURT: Okay.

MR. LIVINGSTON: Thanks.

THE COURT: You're welcome. Bring the jury out.

(WHEREUPON, the jury is present).

08:48:02AM **THE COURT:** Good morning, ladies and gentlemen. You

1 may be seated. You can just come in and sit down when --
2 everyone is standing for you actually.

3 Mr. Bills, you can retake the stand, I remind you
4 you're still under oath.

08:49:17AM 5 (WHEREUPON, William Bills resumed the stand).

6 THE COURT: Mr. Livingston, you may continue your
7 examination.

8 BY MR. LIVINGSTON:

9 Q. Good morning.

08:49:36AM 10 A. Good morning.

11 Q. So I think your last -- we was talking about this the last
12 time --

13 THE COURT: Exhibit No. 4.

14 BY MR. LIVINGSTON:

08:50:18AM 15 Q. Yes, my Exhibit No. 4. If you --

16 A. I recall that.

17 Q. You're saying that the date on that stamp right there, you
18 can't say if that's the date it was mailed. That's what you
19 was saying?

08:50:36AM 20 A. That's what I'm saying, yes.

21 Q. Why would you say that?

22 A. There's nothing on there that indicates when that piece of
23 mail went through the U.S. Postal Service. The only thing on
24 that document or only thing on that envelope is the Pitney

08:51:05AM 25 Bowes stamp that was applied at the Albany -- wherever this

1 is, appeals court office in Albany, New York. That was
2 apparently done in the mail room or correspondence office at
3 the courthouse. It was not done at the U.S. Postal Service,
4 that's why I think it says U.S. postage. And then it says
08:51:24AM 5 Pitney Bowes, it doesn't say U.S. Postal Service. Normally a
6 piece of mail that goes through the U.S. Postal Service would
7 have a USPS stamp.

8 Q. Okay. So if that information was incorrect or different
9 from when the post office received it, don't you think they
08:51:46AM 10 would put something else on it?

11 A. I have no knowledge that that is a practice of the U.S.
12 Postal Service. I don't know that.

13 Q. Okay. I would like to show you something else.

14 **MR. LIVINGSTON:** 6. Getting the hang of it.

08:52:31AM 15 **THE CLERK:** Plaintiff's Exhibit No. 6.

16 **MR. LIVINGSTON:** Yes, thanks.

17 **MR. BENITEZ:** Judge, I would object on three bases.
18 One, that this would be a hearsay document.

19 Number two, that there's no authentication under
08:53:45AM 20 the rules. It's not self-authenticating.

21 And as to its relevance to this particular claim
22 that the -- that that particular envelope, which is
23 Plaintiff's Exhibit 4 was withheld, that's the claim, this is
24 not related to that particular claim.

08:54:06AM 25 So I object on three bases on this document that's

1 been marked as Exhibit Plaintiff 6.

2 **THE COURT:** Can you pass it up to the clerk?

3 Can you explain the relevance, Mr. Livingston?

4 **MR. LIVINGSTON:** Thanks.

08:54:55AM 5 It's from the same court as the envelope that's in
6 dispute and they used the same mailing process, the Bowes, but
7 in this one because it was delivered to the post office on
8 another date from what the Bowes says, the post office put its
9 own stamp and said the date that it received it. So they
08:55:31AM 10 corrected what that date that Bowes says, and I'm trying to
11 show -- because he's saying that that's not necessarily the
12 date it was delivered what the Bowes says, the Pitney Bowes
13 stamp says on this envelope.

14 **THE COURT:** Okay, all right. I'm going to overrule
08:55:52AM 15 the objection.

16 **MR. LIVINGSTON:** Show him?

17 **THE COURT:** Yes, you can show the witness, see if he
18 can identify it.

19 **THE WITNESS:** I would contest the statement if I
08:56:17AM 20 could? This is not --

21 **THE COURT:** No, you don't get to contest the
22 statement.

23 **BY MR. LIVINGSTON:**

24 Q. You see that?

08:56:23AM 25 A. Yes.

1 Q. It got a Bowes stamp. You see the date on what the Bowes
2 stamp says?

3 A. Yes, it says August 24th.

4 Q. And it's another stamp there in black?

08:56:51AM 5 A. Correct.

6 Q. What that say?

7 A. It says August 25th.

8 Q. That's the day prior from the Bowes?

9 A. It's the day after the Bowes.

08:57:01AM 10 **THE COURT:** Those are both '06?

11 **THE WITNESS:** Correct. And this is from New York,
12 not from Albany, this is from New York City.

13 **MR. LIVINGSTON:** Okay, I'll ask the questions.

14 **THE COURT:** Are you moving the admission?

08:57:17AM 15 **MR. LIVINGSTON:** Yes, I would like to.

16 **THE COURT:** You continue to object?

17 **MR. BENITEZ:** Thank you, Judge.

18 **THE COURT:** 6 will be received.

19 (WHEREUPON, Plaintiff Exhibit 6 was received into
08:57:34AM 20 evidence).

21 **BY MR. LIVINGSTON:**

22 Q. You're saying because this was mailed from New York that
23 the mailing process will be different?

24 A. I don't know that for sure. But I just know that this one
08:57:46AM 25 is from New York, New York. The other piece of mail was from

1 Albany, New York. I don't know if there's a variance in how
2 they handled their mail. I have no real knowledge of that.
3 It's just -- I'm making the point that it's not the same --
4 it's not the same mailing origin point.

08:58:03AM 5 Q. So this wouldn't change your opinion of that if this
6 wasn't mailed on the date that the Bowes stamp says, that the
7 post office would correct it and put they own stamp of the day
8 they --

9 A. No, it doesn't.

08:58:21AM 10 Q. -- receive it?

11 So you agreeing that the post office did deliver
12 this envelope?

13 **THE COURT:** You're referring to 4 now just for the
14 record?

08:58:43AM 15 **MR. LIVINGSTON:** Yes.

16 **BY MR. LIVINGSTON:**

17 Q. And Exhibit 4, you agreeing that the post office did
18 deliver that letter?

19 A. I don't understand your question.

08:59:01AM 20 Q. All right. You saying Bowes put that -- it was a Bowes
21 stamp on there, right?

22 A. That's correct.

23 Q. So Bowes don't deliver the mail, do it?

24 A. That's correct.

08:59:08AM 25 Q. U.S. Postal Service deliver?

1 A. That's correct.

2 Q. So that's who delivered that letter?

3 A. That would be correct.

4 Q. So you say they wouldn't deliver it on time because it was
08:59:28AM 5 a Bowes stamp on it?

6 A. I'm not saying that at all.

7 Q. So what you saying?

8 A. I'm saying there's no way to tell. The only -- the only
9 identifying documentation on that whole piece of mail about
08:59:42AM 10 when Elmira, which is when Elmira's responsibility would
11 start, that when that arrived at Elmira is the received stamp
12 that says August 17.

13 I have no knowledge of what could have happened as
14 far as after that Pitney Bowes stamp was put on there, whether
09:00:00AM 15 it stayed at the courthouse, got put on a shelf or a table in
16 the courthouse and got delayed and then they put it in the
17 mail and it came to us, or any point in between the courthouse
18 and Elmira it could have been delayed.

19 Q. All right.

09:00:15AM 20 A. And there would be no demarcation on there to indicate
21 that that I know of.

22 Q. All right. So it couldn't be Elmira's fault that it was
23 stamped 22 days later?

24 A. All I can tell you is our procedure is, as Ms. Gates
09:00:31AM 25 testified to, that as the mail comes in in huge bags, they

1 separate the mail into legal mail, facility mail, and inmate
2 personal mail. Legal mail is then stamped as received and
3 then somebody takes the pile of legal mail and they cell
4 locate the mail, write the cell location on the envelope and
09:00:55AM 5 then it's divided into housing units. There are ten housing
6 units at Elmira and eight -- eight blocks or eight galleries
7 in each housing unit.

8 Q. Okay, okay, okay. So all right. The cell -- the cell
9 location, that's the I-2-6 that's on that envelope?

09:01:12AM 10 A. That's correct.

11 Q. Right. So would you say that person that cell located
12 that letter is the same person that wrote OTC on it?

13 A. I can't say that at all. It's not the practice of the
14 mail room staff to write OTC on an envelope.

09:01:31AM 15 Q. No?

16 A. Because the only thing they would do is in this particular
17 case it's evident by the -- by the demarcation that our
18 correspondence --

19 **THE COURT:** Finish your answer.

09:01:47AM 20 **THE WITNESS:** -- it's evident that the

21 correspondence staff entered I-2-6 on there. How the OTC got
22 on there I would have no idea.

23 **BY MR. LIVINGSTON:**

24 Q. Okay. So why is it evident that the correspondence staff
09:02:02AM 25 entered the I-2-6 on there and not evident that they put the

1 OTC on there?

2 A. I can't tell through the scribble out, I don't know
3 everybody's handwriting specifically.

4 Q. All right.

09:02:16AM 5 A. I do recognize the I-2-6. Again, I supervised the mail
6 room at Elmira for about six years.

7 Q. Okay.

8 A. I do recognize the handwriting.

9 Q. Oh, so who handwriting is that then?

09:02:29AM 10 A. I don't know whose it is, but I recognize it as a piece of
11 handwriting that was common on inmate mail.

12 Q. Oh, so you saying the staff wouldn't put OTC on there? You
13 know what that mean, OTC?

14 **MR. BENITEZ:** Objection, Your Honor, it's been
09:02:50AM 15 asked and answered over and over.

16 **THE COURT:** Not by this witness, I don't think.
17 Overruled, go ahead.

18 **THE WITNESS:** Yes, I know it means -- it's
19 abbreviation for out to court.

09:02:58AM 20 **BY MR. LIVINGSTON:**

21 Q. All right. So that would mean I was out to court when
22 they put that on there, would it?

23 **MR. BENITEZ:** Objection, it calls for speculation.

24 **THE COURT:** Sustained, form of the question.

09:03:11AM 25 **BY MR. LIVINGSTON:**

1 Q. Why would somebody put that on a envelope?

2 A. I have no idea.

3 Q. But you just said it mean out to court so --

4 A. Correct.

09:03:20AM 5 Q. -- wouldn't that tell you something?

6 **MR. BENITEZ:** Objection, Your Honor, just asked and
7 answered.

8 **THE COURT:** Overruled.

9 **THE WITNESS:** I have no idea. Anybody could have
09:03:27AM 10 put OTC on there. You could have written OTC on there.

11 **BY MR. LIVINGSTON:**

12 Q. Wow. Yeah, you -- you said that -- I like to speak about
13 Exhibit B, 9B. Show him?

14 **THE COURT:** Is it marked?

09:03:49AM 15 **MR. LIVINGSTON:** Yes, 9B.

16 **THE COURT:** Okay.

17 **MR. LIVINGSTON:** It's in evidence?

18 **THE COURT:** I don't think it's in evidence. It's
19 not in evidence yet. You can show it to him and ask him if he
09:04:05AM 20 recognizes it.

21 **MR. LIVINGSTON:** Yes.

22 **THE WITNESS:** Yes, I recognize it.

23 **BY MR. LIVINGSTON:**

24 Q. What else you recognize about it? You wrote it?

09:04:20AM 25 A. Yes, it's my handwriting.

1 Q. Thank you.

2 **MR. LIVINGSTON:** Is this in evidence? Can I put
3 this in evidence?

4 **THE CLERK:** It's been marked, but not entered.

09:04:34AM 5 **THE COURT:** Ask Mr. Benitez, any objection?

6 **MR. BENITEZ:** Take a quick look. No objection,
7 Your Honor.

8 **THE COURT:** Plaintiff's Exhibit 9B will be received.
9 You need to give it to the clerk to let her mark it.

09:04:50AM 10 **THE CLERK:** I need Exhibit 6 as well.

11 (WHEREUPON, Plaintiff Exhibit 9B was received into
12 evidence).

13 **BY MR. LIVINGSTON:**

14 Q. You wrote that because the grievance I wrote?

09:05:18AM 15 A. Yes.

16 Q. Just like the statement you made a while ago, you said you
17 don't know if I was the one that wrote the OTC on this. You
18 also try blame me for --

19 **MR. BENITEZ:** Objection, argumentative.

09:05:42AM 20 **THE COURT:** Let him finish his question. Go ahead,
21 finish your question.

22 **BY MR. LIVINGSTON:**

23 Q. -- for not notifying the people in correspondence office
24 that I was back?

09:06:02AM 25 **THE COURT:** Objection is overruled. Go ahead, you

1 can answer that.

2 **THE WITNESS:** Okay. I'm not necessarily blaming you
3 for that. What I'm -- again, the grievance process in the
4 Department of Corrections is supposed to be a non-adversarial
09:06:15AM 5 process, meaning that if a problem is identified by an inmate,
6 we as staff are to look at the circumstances.

7 Now, much like what we're going through here in
8 this court proceeding, a grievance process is something that's
9 already happened. So what we're faced with is, we're faced
09:06:33AM 10 with investigating a situation that -- with the available
11 documentation.

12 As I stated --

13 Q. Not to interrupt you --

14 A. Okay.

09:06:48AM 15 Q. -- don't the grievance directive says -- you familiar with
16 the grievance directive?

17 A. Yes.

18 Q. Not the grievance directive, excuse me. The directive
19 4015, are you familiar with that?

09:07:07AM 20 A. I believe -- I can't tell you -- if you can tell me what
21 the title of 4015 is?

22 Q. I think it's forwarding mail?

23 A. Yes, yes, we reviewed that yesterday.

24 Q. Don't it -- if you recall, it's the responsibility of
09:07:29AM 25 correspondence mail room workers to check and see when

1 prisoner return to cell from court?

2 A. I don't recall that item specifically. My -- my
3 understanding of directive 4015 and the whole process of
4 forwarding inmate mail is for when an inmate is long-term or
09:07:52AM 5 permanently removed from the facility. Then there's a -- in
6 other words, if an inmate is out to court for six months,
7 which happens occasionally, there would be mail there that may
8 have some importance.

9 Q. I'm listening.

09:08:09AM 10 A. Okay, and it can be forwarded to the -- wherever the
11 location of the inmate is.

12 Q. I'd like to show you a copy of 4015. Oh, I think it's
13 already --

14 THE COURT: It's received.

09:08:29AM 15 MR. LIVINGSTON: -- received.

16 THE COURT: Exhibit 18; is that right?

17 MR. LIVINGSTON: Excuse me?

18 THE COURT: Exhibit 18?

19 MR. LIVINGSTON: Correct.

09:08:49AM 20 BY MR. LIVINGSTON:

21 Q. Can you read what that says on paragraph 3? Out to court
22 is its title.

23 A. The correspondence unit, upon notification via facility
24 change sheet, placing an inmate in out to court status shall
09:09:24AM 25 hold all mail received for that inmate until such time, as in

1 this case number 3, the inmate returns from court.

2 Q. So it's not my fault to notify the --

3 A. Right, nobody in the grievance process said that it was
4 your fault. That's why you've used the term --

09:09:41AM 5 Q. Yes, you did -- excuse me -- excuse me?

6 A. -- you used the term "blame."

7 **MR. BENITEZ:** Objection, Your Honor, argumentative.

8 **THE COURT:** Sustained. Don't argue with the
9 witness, let him answer the question.

09:09:49AM 10 **THE WITNESS:** You used the word "blame" and I'm not
11 blaming anybody. I said the grievance process is
12 non-adversarial. I looked at documents and, again, as I
13 indicated yesterday, I recall the grievance was not specific
14 to any one piece of mail.

09:10:04AM 15 It was a general grievance about the fact that you
16 had some pieces of mail that were returned to you on the 17th
17 that had been held, you know, past the -- your return date.

18 And during the grievance process we actually
19 acknowledged the fact that we had pieces of mail that did not
09:10:24AM 20 get returned to you in a timely fashion. But it is not the
21 piece of mail that has anything to do with your appeal process
22 that was from the Syracuse court and a couple others. It was
23 not the piece of mail from the Albany Court of Appeals.

24 **BY MR. LIVINGSTON:**

09:10:41AM 25 Q. All right.

1 A. So through the grievance process -- through the grievance
2 process we actually -- your complaint actually identified a
3 problem that we, you know, admitted culpability to on the
4 other pieces of mail.

09:10:56AM 5 Q. All right. Thank you for that. You see the last
6 sentence? I think it start with periodic checks?

7 A. Yes.

8 Q. All right. Can you read that from there?

9 A. Period checks of inmates whose mail is being held are made
09:11:25AM 10 and inmates can help in these instances by writing to
11 correspondence to let them know that they are back at Elmira.
12 And, again, it's stated that way because I'm asking for help
13 sometimes.

14 Q. Okay. Okay. All right. So you right there, you saying
09:11:40AM 15 it's the inmate's responsibility?

16 MR. BENITEZ: Objection, asked and answered.

17 THE COURT: Yeah, sustained. I don't think that's
18 fair.

19 MR. BENITEZ: It's a waste of time now.

09:11:47AM 20 THE COURT: It's not a waste of time, Mr. Benitez.
21 He has a right to ask questions.

22 MR. BENITEZ: Pursuant to Rule 403, Judge.

23 THE COURT: No, I don't think it's a waste of time
24 at all.

09:11:54AM 25 MR. BENITEZ: Thank you.

1 **BY MR. LIVINGSTON:**

2 Q. So it's a fact that directive 4015, paragraph 3,
3 subdivision A, is the correspondence responsibility to know
4 when a inmate return back from court, correct?

09:12:44AM 5 A. Correct.

6 Q. Excuse me.

7 **MR. LIVINGSTON:** Exhibit 8.

8 **THE CLERK:** Plaintiff's Exhibit No. 8 has been
9 marked.

09:13:48AM 10 **MR. LIVINGSTON:** Thanks.

11 **BY MR. LIVINGSTON:**

12 Q. Do you recognize that?

13 A. Yes, I do.

14 Q. What is that?

09:14:35AM 15 A. That is the inmate grievance complaint filed by you on
16 August 17th, 2006.

17 Q. Thanks. Can you read that?

18 **THE COURT:** Hang on, it's not received yet.

19 **MR. LIVINGSTON:** Excuse me.

09:14:54AM 20 **MR. BENITEZ:** No objection, Your Honor.

21 **THE COURT:** Plaintiff's Exhibit 8 will be received.
22 (WHEREUPON, Plaintiff Exhibit 8 was received into
23 evidence).

24 **MR. LIVINGSTON:** Thanks.

09:15:05AM 25 **BY MR. LIVINGSTON:**

1 Q. Can you read that?

2 A. Yes, I can.

3 Q. Can you read it, please?

4 A. You mean the body where it talks about the description of
09:15:30AM 5 the problem?

6 Q. The first paragraph.

7 A. On the above date I signed for four legal mail. Three of
8 them was being held for me while I was out to court. I
9 returned to this prison on August 2nd, 2006. It should not
09:15:46AM 10 have taken more than two weeks to get my legal mail to me.

11 Because of this lengthy delay to get my mail to me, I'm unable
12 to respond to legal issues that the time limit has expired on.

13 Q. Yes. That's the grievance that your investigation report
14 responded to?

09:16:12AM 15 A. That's correct.

16 Q. So it was specific about what I was complaining about, the
17 letters that was received?

18 A. When I said "it wasn't specific," what I'm saying is it
19 was not specific to the piece of mail from the Albany Court of
09:16:31AM 20 Appeals that has to do with your time limit expiring.

21 Q. But it says it right here, it says "because I'm unable to
22 respond to legal issue that the time limit has expired on"?

23 A. But it did not identify the piece of mail in question.

24 Q. It does, it says three pieces -- four pieces of mail
09:16:54AM 25 received, three of them was being held while I was out to

1 court?

2 A. That's the only information I had to go on when the
3 grievance was filed by you. So it doesn't tell me what date,
4 what court of origin, what legal entity it came from. That's
09:17:10AM 5 what I mean by we didn't have any specifics. So when we made
6 the response, the response is a general response.

7 There were pieces of mail that got put in the out
8 to court bin that were delivered late because either mail room
9 staff didn't check the bin or whatever happened after you came
09:17:31AM 10 back.

11 But it's not the piece of mail that has -- the
12 pieces of mail that were returned to you, none of those were
13 the piece that came in on the 17th of August, to my knowledge.

14 Q. None of them was?

09:17:46AM 15 A. There was only one piece of mail in question in this whole
16 thing that I'm aware of and it's the one from the Court of
17 Appeals that said you had a certain period of time.

18 And I certainly wouldn't have known that because we
19 wouldn't have had any idea what was in any of those envelopes
09:18:00AM 20 because we don't open legal mail.

21 Q. Oh, so your investigation didn't find that out or didn't
22 try to find out like the specifics?

23 A. Well, if I recall, Ms. Gates actually responded and
24 actually put a comment in her response something about the
09:18:19AM 25 fact that since she didn't have -- she no longer had any of

1 the envelopes because they were delivered to you.

2 She didn't have any way of looking at the envelopes
3 unless you brought them forward at the grievance process,
4 which is your right to do once you -- once the responses are
09:18:36AM 5 taken in and then the grievance hearing is held outside of our
6 presence, you have the right to bring in additional
7 documentation to support your claim. And that would have
8 included the specific envelopes that were delivered late.

9 Q. Do you remember what the grievance response was to this?

09:19:02AM 10 A. Probably only because of viewing them in some preparation
11 for this hearing, but I wouldn't necessarily get a copy of
12 that response because it's -- once I've done my investigation,
13 it goes to the grievance committee.

14 They're a separate set of people, security, inmate
09:19:20AM 15 and program people on that committee and they review all the
16 facts and they give a determination. That -- I don't have any
17 further knowledge of that once it leaves my office as an
18 investigation.

19 Q. Because of my grievance, what took place in correspondence
09:19:47AM 20 because of the issues that I complained of?

21 A. Well, as a result of the investigation, as I said before,
22 there were pieces of mail that were delayed upon your return
23 from court. They were in the out to court bin.

24 As a result of my response and then forwarding up
09:20:10AM 25 to my supervisor, Ms. Whitten, the recommendation was that the

1 out to court legal bin be checked every day to try to prevent
2 anything like this from happening again.

3 Q. That fix, that didn't fix my problem, did it?

4 A. Well, I'm not sure in your case, again, I'll repeat it for
09:20:39AM 5 the umpteenth time, the pieces of mail which were held were
6 not the piece of mail that had anything to do with the
7 timeframe of your appeal.

8 Q. All right.

9 A. The only -- that piece of mail that withheld your appeal
09:20:54AM 10 is the one that we've talked at length about with the Pitney
11 Bowes stamp on it, and then the only stamp that we have to
12 indicate when our office received it was the correspondence
13 stamp that indicated that we received it on the 17th of
14 August, 2006.

09:21:09AM 15 Q. Yeah, you keep coming back to that like your office didn't
16 delay my mail from being delivered to me.

17 A. That particular piece of mail we didn't.

18 Q. Just because it was stamped on August 17th, 2006?

19 A. That was when our office received the piece of mail
09:21:30AM 20 according to the stamp on the envelope.

21 Q. But the stamp doesn't say that though?

22 A. The received stamp says that, doesn't it?

23 Q. No.

24 A. What does it say? I shouldn't be asking questions.

09:21:41AM 25 Q. You tell me what it says. There it is right there.

1 A. It says received August 17, 2006. Correspondence.

2 Q. Yeah, but it don't say your office -- correspondence

3 office received it. It says "correspondence received,"

4 correspondence like it could have happened -- it could mean

09:22:01AM 5 that my name and number on the envelope received this

6 correspondence on that date. It don't say the correspondence

7 received it -- correspondence office received it.

8 **MR. BENITEZ:** Objection, form.

9 **THE COURT:** Yeah, sustained.

09:22:17AM 10 **BY MR. LIVINGSTON:**

11 Q. All right, let me show example of what I'm speaking about.

12 You see that date on the grievance?

13 **THE COURT:** What is this? What are you showing?

14 **THE WITNESS:** Yes.

09:22:33AM 15 **MR. LIVINGSTON:** Exhibit 8.

16 **THE COURT:** Exhibit 8?

17 **MR. LIVINGSTON:** Yes.

18 **THE COURT:** Thank you.

19 **BY MR. LIVINGSTON:**

09:22:37AM 20 Q. You see that date right there?

21 A. Yes, 8/17/06.

22 Q. It says received, and read the rest.

23 A. Received August 22nd, 2006, inmate grievance program

24 office.

09:22:50AM 25 Q. All right. See it's specific what happened here?

1 A. Right.

2 Q. This letter that you keep saying that you didn't

3 receive -- your office didn't receive, doesn't say --

4 specifically say that the correspondence office received it

09:23:06AM 5 like this one says the grievance program unit office received

6 it on that date.

7 But this stamp says is received August 17 -- excuse

8 me, correspondence. So I received that correspondence on that

9 day?

09:23:21AM 10 A. If my recollection serves me correct, Ms. Gates testified

11 that that is the stamp that is used in the -- or was at the

12 time she worked there, that is the stamp that is used in the

13 correspondence office at Elmira and is stamped on every piece

14 of mail that's received in the correspondence office.

09:23:39AM 15 Q. Mm-hmm. But -- all right. When? Like as soon as it come

16 through the door it's stamped?

17 A. As soon as it's sorted.

18 Q. Sorted. So it could be sorted later?

19 A. No, all mail is sorted every day when the bag comes in in

09:23:55AM 20 the morning. Again, Ms. Gates testified every morning when

21 the mail comes in in the bags it's taken out, sorted into the

22 three or four different categories, and it's stamped as

23 received. The legal mail specifically is separated and

24 stamped as received before it's even cell located, before it's

09:24:17AM 25 even separated into blocks, it's all stamped with a hand stamp

1 that has an adjustable date on it, each day you change it to
2 the current date and you stamp all the incoming mail.

3 Q. So this letter couldn't be put to the side to be stamped
4 later?

09:24:38AM 5 A. I'm not saying it couldn't be, but I don't know what
6 reason anybody in the mail room would have to set a piece of
7 mail aside to not stamp it.

8 Q. Because I'm out to court like it says right there, that's
9 the reason right there.

09:24:50AM 10 A. Again, we wouldn't even be looking at that, we wouldn't
11 have looked at whose piece of mail it was or where the cell
12 location was.

13 Q. Hold up. Why wouldn't you? Because there's been
14 testimony that it's cell checked to see where the individual
09:25:08AM 15 that is delivered to, where -- and if they are out to court,
16 it's put in a holder or a file, out to court file or
17 something?

18 A. The received stamp is put on every piece of mail before an
19 inmate's name or cell location is even considered on it.
09:25:28AM 20 There's a huge pile of mail there and the first step in the
21 whole thing is to stamp it received. Then it's taken over to
22 a desk where there's a computer and they punch in the
23 department ID number, and they cell locate it and enter the
24 cell location on the piece of mail.

09:25:49AM 25 Q. Looking at Exhibit 10, so on the July 26th, 2006 --

1 **THE COURT:** Would you turn it sideways so it can be
2 read? Thank you.

3 **BY MR. LIVINGSTON:**

4 Q. On this date right here that same thing happened to that
09:26:07AM 5 letter right there?

6 A. Yes, my recollection is that your -- you actually went out
7 to court on 7/26; is that correct? Did you -- were you out to
8 court? Did you go out?

9 **THE COURT:** You can't ask questions.

09:26:18AM 10 **THE WITNESS:** Okay. My recollection is that you
11 went out to court on 7/26. So there's a very good possibility
12 that if it coincided with the date you went out when this
13 piece of mail was cell located, stamped and cell located,
14 there's a very good chance that up in that computer program
09:26:34AM 15 that Ms. Gates testified about that your cell location still
16 showed as I-2-6.

17 So it was probably written on the envelope I-2-6,
18 and then it was -- after all the processing was done it was
19 put in that envelope that she indicated, taken to the block
09:26:51AM 20 and then when they got to the block to your cell, the officer
21 saw you weren't there, checked at the front desk and found out
22 that you were out to court.

23 Q. So she cell located this letter and found out I was still
24 in the cell?

09:27:08AM 25 **MR. BENITEZ:** Objection, Your Honor, I object to

1 the "she" reference. There's no --

2 **THE COURT:** Sustained.

3 **BY MR. LIVINGSTON:**

4 Q. You saying that defendant Gates cell located this letter,
09:27:23AM 5 right?

6 A. Actually, no.

7 **MR. BENITEZ:** Objection again, Your Honor, there's
8 no evidence in the record that Ms. Gates did this.

9 **THE COURT:** Sustained.

09:27:29AM 10 **BY MR. LIVINGSTON:**

11 Q. All right. But that's the process, right?

12 A. Whoever in the mail room handled that piece of mail would
13 have taken the piece of mail, along with the rest of the pile,
14 would have taken the pile and would have punched your inmate
09:27:46AM 15 identification number into the computer and whatever it said
16 on the screen it would have -- they would have entered that on
17 the form.

18 Q. Okay. But this form right here?

19 A. On the letter. It would have been written on the letter
09:28:00AM 20 like we saw in the example several times, it would have I-2-6.
21 If that is the date that you went out to court, 7/26, it's
22 very likely that the cell change did not happen right away and
23 that you were still showing as being assigned to that cell.

24 Q. All right. When they did that, and they put the I-2-6 on
09:28:27AM 25 it, the cell location, right? They would also put -- that's

1 all they would have put on it, right?

2 A. No idea. There's -- there's 700 correction officers in
3 the --

4 Q. I'm not talking about correction officer. I'm talking
09:28:47AM 5 about the person that did the mail.

6 A. The mail room -- the only thing they would have written on
7 the piece of mail at that time would have been your cell
8 location, correct.

9 Q. It would have been stamped on that date?

09:29:13AM 10 A. Yes.

11 Q. That letter would have been returned to the correspondence
12 office for hold after realizing I was out to court?

13 A. That's correct.

14 Q. It wouldn't be stamped again, would it?

09:29:36AM 15 A. No.

16 Q. It -- they wouldn't stamp it again?

17 A. That wouldn't be normal procedure.

18 Q. So they put this letter in a -- what kind of -- is it a
19 file or --

09:29:50AM 20 A. Yeah, it's just in a -- I assume, and I can't testify to
21 this because I don't handle the mail, but through this --
22 through this testimony it would appear that the mail room
23 staff put it in a manila envelope with your name and DIN on it
24 and it's put in a section of a file cabinet that says out to
09:30:12AM 25 court.

1 Q. All right. They checked this file cabinet like once a
2 week or a day?

3 A. Well, again, the practice that was what the grievance
4 ended up finding out, that the practice was that it was being
09:30:32AM 5 checked probably on a weekly basis. I don't know exactly. It
6 would depend on staffing issues at the time. I believe there
7 were only three people assigned to the mail room and at that
8 time I believe there was one of the staff who were actually
9 out on a long-term sick. So they weren't there during any of
09:30:54AM 10 this.

11 Q. So when the mail is checked you say once a week, right?

12 A. I can't say for sure. I'm not there. I don't know, I
13 can't say from experience how often it's checked. It should
14 be checked -- at that point in time the practice was it should
09:31:18AM 15 be checked whenever they had the opportunity, and usually once
16 a week.

17 Q. You see this exhibit, same exhibit?

18 A. Yes.

19 **THE COURT:** Exhibit what?

09:31:35AM 20 **MR. LIVINGSTON:** 10, second page.

21 **THE COURT:** Thank you.

22 **BY MR. LIVINGSTON:**

23 Q. On August 11th, '06, you see my name right there?

24 A. Yes, I do.

09:31:45AM 25 Q. And you see the entry?

1 A. New York State Attorney General Albany.

2 Q. Yeah. So when they delivered this letter right here,
3 shouldn't that letter -- that letter from Syracuse be included
4 in that?

09:32:08AM 5 A. If they had checked the out to court file and discovered
6 that you had mail on hold, yes. It, you know, procedurally it
7 should have been included in that delivery, yes.

8 Q. So that's what caused the delay then?

9 A. That's not what caused the delay for the piece of mail
09:32:28AM 10 that has to do with your appeal.

11 Q. It's the procedures that caused the delay?

12 A. No, not necessarily. The piece of mail that -- the piece
13 of mail in question that delayed your -- or that made your
14 appeal paperwork untimely was stamped as being received on the
09:32:49AM 15 date it was delivered August 17th, 2006.

16 Q. So that procedure that delayed me from getting a letter
17 that was delivered to me on July 26th, but I was out to court,
18 couldn't be the procedure that delayed me from getting the
19 July 26th letter?

09:33:13AM 20 A. The evidence doesn't suggest it because the stamp said it
21 was received in our office on August 17th, the day it was
22 delivered.

23 Q. Don't the evidence also show that this was put in a out
24 of -- out to court file?

09:33:28AM 25 A. No, it doesn't.

1 Q. So what account for the OTC? Somebody scribbled out on
2 there?

3 A. We've been over this several times. The OTC, there's
4 nothing there that indicates that the OTC was written by
09:33:41AM 5 anybody in the mail room.

6 Q. It matches up with the person that wrote the cell
7 location?

8 A. I don't know how you do that.

9 Q. Same color pen, same -- look like same handwriting?

09:33:58AM 10 **MR. BENITEZ:** Objection, Your Honor, argumentative.

11 **THE COURT:** Sustained.

12 **BY MR. LIVINGSTON:**

13 Q. Is it the same color pen?

14 A. I don't see it that way.

09:34:06AM 15 Q. You don't see the color?

16 A. If I could look at the original maybe I would have a
17 better --

18 **MR. LIVINGSTON:** Can I show him this?

19 **THE COURT:** Sure.

09:34:16AM 20 **THE WITNESS:** Again, I can't tell for sure the
21 scribble -- the scribble mark kind of covers everything that I
22 can see here.

23 **BY MR. LIVINGSTON:**

24 Q. But one thing you sure about can you see the color of it?

09:34:39AM 25 A. It appears to be green.

1 Q. And the other scribble mark, too, correct?

2 A. Yes.

3 Q. And the OTC that's underneath it, the scribble is green
4 too?

09:34:49AM 5 A. Yeah, it appears to be.

6 Q. So same pen?

7 A. I can't say that for sure. There are a lot of green pens.

8 Q. Okay. How long mail from Albany usually take to arrive in
9 Elmira?

09:35:26AM 10 A. I have no idea. I don't work -- I don't work directly in
11 the mail room. If I was going to venture a guess I would say
12 it's going to take anywhere from 3 to 7 business days
13 depending on when it's mailed and what route it takes to get
14 there.

09:35:43AM 15 Q. What route it takes, what that mean?

16 A. How it's batched and what Postal Service or postal office
17 it touches down at before it arrives at our Elmira location.

18 Q. So would you agree that the post -- United States Postal
19 Service delivered this letter to Elmira?

09:36:11AM 20 A. I already agreed to that.

21 **THE COURT:** "This," you're talking about Exhibit 4?

22 **MR. LIVINGSTON:** Yes.

23 **BY MR. LIVINGSTON:**

24 Q. So what you said, seven days tops you give it?

09:36:26AM 25 A. Yes.

1 Q. So from July 26th, 2006, to August 17th, 2006, that's like
2 over, that's like three weeks, right?

3 A. That's correct.

4 Q. That would be like too long or --

09:36:51AM 5 A. I'm not sure what you're asking me here.

6 Q. You said it probably take seven business days?

7 A. Correct, usually.

8 Q. So three weeks would be longer than the seven business
9 days, right?

09:37:09AM 10 A. Yes, it would.

11 Q. Oh, yeah. Your report that you did on the investigation
12 of the grievance, it never did once deny that this letter was
13 withheld and delivered to me -- delivery to me was delayed?

14 A. As I stated, the grievance was not specific to any piece
09:37:49AM 15 of mail, any entity that the mail was coming from. It just
16 generally said that there were pieces of legal mail that were
17 withheld for a longer period of time than normal when you
18 returned from out to court.

19 Q. Okay. So the legal mail that was -- I mean the mail that
09:38:16AM 20 was spoke about or referred to in the grievance, you never --
21 you did never deny that it was withheld and delayed, right?

22 A. No.

23 Q. Do you know who is responsible for delaying this legal
24 mail?

09:38:41AM 25 A. No, I do not.

1 Q. Would you tell me if you did?

2 A. Surely I would.

3 Q. Your orders come from defendant Whitten during --
4 regarding mail room?

09:39:04AM 5 A. She is my supervisor. Any response or any decision I
6 would make about the mail room would be moved up the chain of
7 command to her for review and approval or amendment or denial.

8 Q. So that's a yes or a no? You didn't really answer.

9 **MR. BENITEZ:** Objection, form.

09:39:33AM 10 **THE COURT:** Sustained.

11 **BY MR. LIVINGSTON:**

12 Q. So you didn't really answer my question. Is that your --
13 she the one that give you orders regarding the mail room
14 issues or activities or --

09:39:50AM 15 A. The form of the question is -- it's hard for me to answer
16 because she doesn't necessarily give me orders about the mail
17 room. She's not really involved in the mail room. She is
18 another level removed from the mail room operation above me.

19 She would have just about no cause to go to the
09:40:13AM 20 mail room except for going on rounds around the facility and
21 stopping in and seeing people. The only time she would have
22 any dealings with the mail room would be if an issue came to
23 her and then came down to me and went to the mail room and
24 then back up the chain of command or if there was a purchase
09:40:32AM 25 or something like that that had to be made, it would come

1 through me to her and she would be the final sign off.

2 Q. But if she wanted to tell you something, that's who it
3 would come from, right?

4 **MR. BENITEZ:** Objection.

09:40:45AM 5 **THE COURT:** Sustained. Are you almost done?

6 **MR. LIVINGSTON:** Excuse me?

7 **THE COURT:** Are you almost done?

8 **MR. LIVINGSTON:** No.

9 **THE COURT:** Well, you better. We're not going to go
09:41:00AM 10 through the same things over and over again.

11 **BY MR. LIVINGSTON:**

12 Q. So what was the fix that occurred after my grievance?

13 A. I answered this question, but I will answer it again. The
14 determination was that the legal, out to court legal mail file
09:41:30AM 15 would be checked daily.

16 Q. Yesterday you said that there was no deputy superintendent
17 of program?

18 **MR. BENITEZ:** Objection, Your Honor. This has been
19 asked and answered.

09:42:01AM 20 **THE COURT:** Sustained. We're not going to keep
21 repeating questions.

22 **MR. LIVINGSTON:** Okay. Just trying to be thorough,
23 Your Honor.

24 **THE COURT:** I understand. I'm letting you be
09:42:19AM 25 thorough, but I'm not going to let you be repetitive.

1 **MR. LIVINGSTON:** That's it for this one.

2 **THE COURT:** Thank you. Mr. Benitez?

3 **MR. BENITEZ:** I have no questions of this witness,
4 Your Honor.

09:42:39AM 5 **THE COURT:** You may step down, thank you.

6 (WHEREUPON, the witness was excused).

7 **THE COURT:** Call your next witness. Call your next
8 witness.

9 **MR. LIVINGSTON:** Call defendant Whitten.

09:42:53AM 10 **PLAINTIFF'S WITNESS, NANCY WHITTEN, SWORN**

11 **DIRECT EXAMINATION**

12 **THE CLERK:** Please, state your name and spell it for
13 the record.

14 **THE WITNESS:** Nancy R. Whitten, N-A-N-C-Y, R,
09:43:33AM 15 W-H-I-T-T-E-N.

16 **THE CLERK:** Thank you.

17 **THE COURT:** You may proceed.

18 **BY MR. LIVINGSTON:**

19 Q. Good morning.

09:43:46AM 20 A. Good morning.

21 Q. What was your job in Elmira?

22 A. I had several jobs. What period of time are you talking
23 about?

24 Q. Around July 2006.

09:44:18AM 25 A. Okay. In the summer, July of 2006 I transferred to Elmira

1 to assume the position of deputy superintendent for program
2 services.

3 Q. Where you transfer from?

4 A. Southport Correctional Facility as deputy superintendent
09:44:32AM 5 for program services.

6 Q. Oh, so you had the same title over there?

7 A. That is correct.

8 Q. What job did you do?

9 A. I was deputy superintendent for program services. I

09:44:48AM 10 oversaw all of program services for Elmira Correctional
11 Facility and the department heads, the staff that supervised
12 those programs.

13 Q. Do you remember a memo that you wrote dated August 30th,
14 2006?

09:45:14AM 15 A. No, I have no recollection of what I did back in 2006.

16 Q. You not a deputy superintendent?

17 A. I've been retired since 2009.

18 **MR. LIVINGSTON:** Can I have this 9C?

19 **THE CLERK:** Okay. Plaintiff's Exhibit 9C is marked.

09:45:54AM 20 **MR. LIVINGSTON:** Thanks.

21 **BY MR. LIVINGSTON:**

22 Q. You recognize that?

23 A. Yes, that's my signature and my memo.

24 **MR. LIVINGSTON:** Evidence.

09:46:31AM 25 **THE COURT:** You move it into evidence?

1 **MR. LIVINGSTON:** Yes.

2 **THE COURT:** Any objection?

3 **MR. BENITEZ:** No objection.

4 **THE COURT:** Plaintiff's Exhibit 9C will be received.

09:46:39AM 5 (**WHEREUPON**, Plaintiff Exhibit 9C was received into
6 evidence).

7 **BY MR. LIVINGSTON:**

8 Q. You say you don't recall any of this?

9 A. The most recollection I have is being in the courtroom and
09:46:52AM 10 having it all brought back, but individual items, no, from the
11 time that I've been retired I have -- don't remember
12 individual pieces of correspondence that I do --

13 Q. You can see that?

14 A. Yes. Well, as far as it's better bigger.

09:47:08AM 15 Q. Yeah.

16 A. Thank you.

17 Q. Can you read that?

18 A. Yes.

19 Q. Please?

09:47:13AM 20 A. Well, per our conversations and as a result of the
21 investigation of grievance EL144-06, this is to confirm that
22 effective immediately legal mail being held for out to court
23 inmates will be cell located daily to determine if the inmate
24 has returned to the facility. As soon as it has been
09:47:33AM 25 determined that the inmate has returned to the facility, his

1 legal mail will be processed.

2 Q. So who were you speaking to? Who were you speaking to
3 with this memorandum?

4 A. It says I sent the memo to Mr. Bills, and there was two
09:47:52AM 5 reasons for the memo. If you see in the document part of it
6 he and I had spoken as a result of the investigation for the
7 grievance.

8 And part of -- as Mr. Bills explained, part of the
9 grievance process is if there is something that needs to be
09:48:08AM 10 corrected, we try to make sure that the correction occurs and
11 this is one of the corrections, that instead of having the
12 mail located -- out to court mail being located for the
13 inmates periodically, I made the determination it needed to be
14 done daily. That's so all inmates that were in out to court
09:48:31AM 15 status, we made sure that it was done daily.

16 Q. So you was speaking to defendant Bills right here? That's
17 my question, that's my only question.

18 A. Yes, it says to William Bills SCC.

19 Q. I'm just trying to make it clear. That's all.

09:48:58AM 20 Do you know what caused the delay?

21 A. I have no knowledge of the daily operations and what
22 caused the delay, no.

23 Q. But you investigated it, you didn't find out the reason?

24 A. I have no idea. I had no idea based on -- my response was
09:49:12AM 25 based on the investigation that -- what was written down in

1 the grievance process.

2 Q. All right. So during the investigation, in order to fix
3 it, that's your -- your memo seem to be wanting to do, you had
4 to find out what caused it to be fixed, what needed to be
09:49:31AM 5 fixed, right?

6 A. And the point being was -- the need to be fixed was that
7 the mail was not being checked daily. The out to court mail,
8 the legal mail for the out to court inmates was not being
9 checked daily as determined by the investigation. I don't
09:49:53AM 10 recollect the exact wording, but I think it was periodically.

11 Q. So that part was broken?

12 A. Well, it needed correction.

13 Q. Needed to be fixed?

14 **MR. BENITEZ:** Objection, Your Honor.

09:50:08AM 15 **THE COURT:** Sustained.

16 **MR. LIVINGSTON:** Your Honor, I would like to say
17 something because --

18 **THE COURT:** No, you can't say something. You'll
19 have an opportunity, you can testify.

09:50:18AM 20 **MR. LIVINGSTON:** All right. According to his
21 objection, that's why I wanted to clarify because these --

22 **THE COURT:** His objection? You wanted to respond to
23 his objection?

24 **MR. LIVINGSTON:** Yes.

09:50:26AM 25 **THE COURT:** Okay.

1 **MR. LIVINGSTON:** Because these witnesses they come
2 up here long-winded and then I don't get to ask the question,
3 and then when I ask the question they say they answered it
4 already.

09:50:35AM 5 **THE COURT:** Well, they did though. No, in this case
6 she certainly did. She said okay, that part was broken and
7 the answer was well, it needed correction. And then you asked
8 another question along the same lines and I sustained the
9 objection. We're not going to allow repetition.

09:50:56AM 10 **BY MR. LIVINGSTON:**

11 Q. During your investigation, did you find out -- did you
12 surmise that it was my fault for the delay?

13 **MR. BENITEZ:** Objection, form of the question.

14 **THE COURT:** Sustained.

09:51:20AM 15 **BY MR. LIVINGSTON:**

16 Q. Was I the cause of the delay?

17 A. I have no knowledge of what the cause of the delay was.

18 Q. That's why you have to fix that part that you fixed
19 because you didn't have any knowledge?

09:51:40AM 20 A. No.

21 **MR. BENITEZ:** Objection.

22 **THE COURT:** Overruled. You can answer that.

23 **THE WITNESS:** The part that needed to be fixed was
24 because procedurally the mail should have been -- that type of
09:51:50AM 25 mail should have been checked daily so that inmates coming

1 back from out to court were afforded the very best opportunity
2 to get their mail. Simple as that.

3 **BY MR. LIVINGSTON:**

4 Q. So it wasn't my fault?

09:52:04AM 5 A. I already said I have no idea.

6 Q. I don't have nothing to do with the checking of the mail,
7 am I?

8 A. With the checking of the mail?

9 Q. Yes.

09:52:16AM 10 A. That's all done in the correspondence office.

11 Q. And I don't work there or I don't go there or anything?

12 **MR. BENITEZ:** Objection, asked and answered.

13 **THE COURT:** Sustained.

14 **BY MR. LIVINGSTON:**

09:52:41AM 15 Q. So why did you conclude that the out to court folder is
16 needed to be monitored on a daily basis?

17 A. Why did I conclude that?

18 Q. Yes.

19 A. I've already -- I'll repeat it, because inmates coming
09:52:57AM 20 back from out to court, if they had legal mail, we want to
21 give them every opportunity to get it. If the mail was not
22 being checked daily, it needed to be checked daily.

23 Q. Have any -- how -- who would be your boss?

24 A. The superintendent.

09:53:20AM 25 Q. That's it?

1 A. That's correct.

2 Q. He didn't tell you to hold my legal mail, did he?

3 A. He didn't. He gives me no instruction regarding opening
4 mail. It's not my job to open mail. I don't open mail.

09:53:40AM 5 Q. No, I didn't say open. I said hold?

6 A. Hold? I'll change the word. I have no jurisdiction, no
7 authorization to hold mail and he did not give me any
8 authorization to hold anyone's mail.

9 Q. Okay. Would a outside agency speak to you regarding prison
09:54:08AM 10 mail room activities?

11 A. No.

12 Q. Who would they speak to if they had a inquiry?

13 **MR. BENITEZ:** Objection.

14 **THE COURT:** Sustained.

09:54:19AM 15 **BY MR. LIVINGSTON:**

16 Q. You said you didn't have a direct supervision of the mail
17 room?

18 A. That's correct. I don't directly supervise the mail room.

19 Q. So why did you answer the grievance and not the assistant
09:55:02AM 20 deputy superintendent of programs?

21 A. The assistant deputy superintendent for programs oversaw,
22 and I believe Mr. Bills talked about this a little bit
23 yesterday, the assistant deputy superintendent of programs
24 services is in charge of the reception center. The mail room
09:55:18AM 25 happens to be located in the reception center, but the mail

1 room in any facility is under the jurisdiction of a deputy
2 superintendent for program services, not the assistant deputy.
3 It's a little cloudy, I guess you could say, for Elmira just
4 because of the location of the mail room, the fact that it is
09:55:37AM 5 there. So he is available, but ultimately the mail room falls
6 under my jurisdiction.

7 Q. Do you remember doing the interrogatory from me?

8 A. Yes.

9 Q. Do you remember this question and response?

09:56:11AM 10 **THE COURT:** Do you have a page or reference?

11 **MR. LIVINGSTON:** Second page of supplement,
12 defendant Whitten's response to defendants' first set of
13 interrogatory dated January 18 of this year.

14 **BY MR. LIVINGSTON:**

09:56:41AM 15 Q. Response?

16 **THE COURT:** Why don't you ask her the question,
17 with the question and the answer?

18 **MR. LIVINGSTON:** Yes.

19 **BY MR. LIVINGSTON:**

09:56:47AM 20 Q. I asked you when did you -- no, not that one. Number two,
21 describe your job in detail in regards to the Elmira
22 Correctional Facility mail room.

23 And I guess you said object. This interrogatory is
24 irrelevant. Without waiving objection, I had oversight of
09:57:13AM 25 facility programs and did not have direct supervision of the

1 mail room, that would have -- that would have been the
2 assistant deputy superintendent of programs.

3 Do you remember that response?

4 A. Right. Yes.

09:57:30AM 5 Q. So that's -- that response was incorrect?

6 A. Like I said, with Elmira Correctional Facility, the
7 day-to-day operations was supervised by Mr. Bills . The
8 assistant deputy superintendent was available, but ultimately
9 the final overseeing of the program, if there was anything
09:57:51AM 10 that the assistant deputy superintendent noticed because of
11 the location, because it fell in Elmira reception, he would
12 ultimately have to respond, come to me and I was the final
13 authority for the mail room.

14 So as I said before, it's a little cloudy in Elmira
09:58:10AM 15 because of the location of the mail room and the fact that
16 there is an assistant deputy superintendent there in the
17 reception center, but ultimately the mail room falls under the
18 jurisdiction, the final jurisdiction for the deputy
19 superintendent.

09:58:24AM 20 Q. So why did he respond to the grievance or --

21 A. Well, from what I can remember from the grievance process,
22 any program services grievances when -- let me back up, if I
23 may, and explain a little bit.

24 When an inmate files the grievance an investigation
09:58:58AM 25 is done by the area. Hence, Renee Gates and William Bills did

1 an investigation. It goes to a grievance committee as
2 Mr. Bills explained, it has representatives on it. They make
3 a decision. You have the right to appeal that decision or any
4 inmate has the right to appeal that decision.

09:59:17AM 5 And then ultimately if there is an appeal, it's
6 going to go to the deputy superintendent that oversees the
7 general area. That's why I got that because as I said before,
8 the correspondence office ultimately falls under my
9 jurisdiction. So the grievance was a program services
09:59:35AM 10 grievance, so I responded.

11 Q. So they skipped over the assistant deputy?

12 A. Correct, because he does not directly fall in line for
13 program services grievances because he was the reception --
14 what we call the reception deputy superintendent, the

09:59:50AM 15 assistant deputy superintendent for program services. His
16 primary responsibility was the reception center processing.

17 Q. You know what happened as a result of that grievance was?

18 A. That the mail was going to be cell located, the legal mail
19 was going to be cell located daily. That's to the best of my
10:00:15AM 20 recollection.

21 **MR. LIVINGSTON:** That's it, thank you.

22 **THE COURT:** Thank you.

23 **MR. BENITEZ:** I have no questions of this witness.

24 **THE COURT:** Thank you, you may step down. Thank you
10:00:24AM 25 very much.

1 Ladies and gentlemen, at this time we're going to
2 take a recess for approximately 15 minutes. I'd ask you not
3 to discuss the matter or allow anybody to discuss the matter
4 with you. At this time the jury may step down, we'll stand in
10:00:33AM 5 recess for 15 minutes. Thank you.

6 (WHEREUPON, the witness was excused.)

7 (WHEREUPON, there was a pause in the proceeding.)

8 **THE COURT:** Ready to proceed? Are you going to
9 testify next?

10:30:47AM 10 **MR. LIVINGSTON:** Yes. I would like to ask how
11 would I do this? I would have my exhibit on the stand with me
12 and when I need to put it in evidence same procedure?

13 **THE COURT:** Yes, sure. Basically we do it in
14 narrative style. If you have an exhibit, it would have to be
10:31:05AM 15 marked, show it to Mr. Benitez and then you can move its
16 admission, I'll make a decision.

17 **MR. LIVINGSTON:** I don't get down and show him --

18 **THE COURT:** Well, he can come up to you, okay?

19 **MR. BENITEZ:** I'll approach.

10:31:20AM 20 **MR. LIVINGSTON:** Okay.

21 **THE COURT:** All right. Bring the jury out.

22 (WHEREUPON, the jury is present).

23 **THE COURT:** Ready to proceed.

24 **MR. LIVINGSTON:** Yes. I'm calling me.

10:32:31AM 25 **THE COURT:** Okay.

PLAINTIFF'S WITNESS, DETROY LIVINGSTON, SWORN

DIRECT EXAMINATION

THE CLERK: State your name and spell it for the record.

10:32:50AM **THE WITNESS:** Detroy Livingston, D-E-T-R-O-Y, L-I-V-I-N-G-S-T-O-N.

THE CLERK: Thank you. Have a seat.

MR. LIVINGSTON: Good morning. In July of 2006 I initiated a writ of error coram nobis in Appellate Division Second Department located in Brooklyn, New York.

And in that writ of error coram nobis I stated that appellate lawyer that I was given by the court didn't raise some critical issue that would have overturned, reversed my conviction.

10:33:55AM And in this petition I said it was a part of the record, meaning that it was transcribed in the court's transcript, like this lady is doing, and so it was obviously part of the record and he should have known and submitted on appeal.

10:34:28AM And in this writ I told them that during jury deliberation that when the jury asked the judge or the Court a question, they didn't follow procedure that by law says they must follow. That -- what happened the jury asked -- I don't remember exactly what they asked, but it's written down here, you can read it, so they sent a note out to the Court, the

10:35:03AM

1 judge gets it, he reads it and what he was supposed to do was
2 notify me and my attorney and then we discuss it, what should
3 be the response to the note.

4 What happened during that time he, like,
10:35:36AM 5 disregarded the procedure. Instead of calling me and my
6 attorney back to court and discuss what we was gonna do about
7 the note, he sent a law clerk to they room, I don't know what
8 was said by the law clerk to the jury. Then they continued to
9 deliberate. Then they sent another note and they took like
10:36:08AM 10 two hours to notify us, me and my attorney.

11 And that's a violation, too, because the law says
12 we must be notified immediately. And when we was notified we
13 came out and my attorney told him we want to do this, we want
14 to submit this, too, in response to they inquiry.

10:36:41AM 15 And he basically didn't do what we asked. He did
16 it his way. And they sent another note trying to get another
17 note on a issue, he didn't do it that way again. He took
18 another while and finally he told them -- I think they wanted
19 a read back of testimony from one of the witness.

10:37:23AM 20 And it didn't take place that way so I got
21 convicted unfortunately. And I did the appeal, the lawyer
22 didn't put that issue inside the brief. That's the argument
23 to the appellate court.

24 And I didn't know what -- I had the issue because I
10:37:57AM 25 didn't know the law at the time that good, you know, during my

1 years, you know, me and other people, you know, sit down and
2 discuss it. So one day I'm at Elmira law library and me and
3 these persons was speaking and they was talking about this
4 issue right here and I said "oh, I got that issue right
10:38:19AM 5 there." So the person, I think his name is Adam Jameson, he
6 was in the crowd speaking by the -- and I said, "you know, I
7 got that issue right there," he said, "let me see it."

8 So I gave him the minutes, you know, the trial
9 record. And he read it. He said, "yeah, you got that
10:38:38AM 10 record." He said your issue is even stronger than the dude
11 that he was speaking to. He said, "your issue is stronger
12 than his."

13 So he said he would like to help me do it, you
14 know, the brief with the error coram nobis because he said the
10:38:54AM 15 lawyer supposed to did it was supposed to include that inside
16 the appellate brief.

17 So he said the right vehicle to petition the Court
18 with was the error coram nobis. So we did this, this is right
19 here included, it's about 200 page. The first couple pages is
10:39:29AM 20 the writ, our argument itself. And then the other parts,
21 these parts, is the trial minutes. So we had to break it down
22 to show them where the trial minutes, the error occurred and
23 what -- exactly verbatim what, you know, the error was.

24 So we did that. And the Appellate Division, they
10:40:04AM 25 ruled against it. They didn't really say why, like, break

1 down the merits or anything. They just said I didn't show
2 that that counsel was ineffective. That's what writ of error
3 coram nobis is, a petition stating that the appellate lawyer
4 was ineffective.

10:40:29AM 5 But basically that's -- that's how they do it
6 anyway because I never seen a case where they -- the
7 Appellate Division will reverse they own decision. They will
8 let the higher court do it, the New York State Court of
9 Appeals, that's the highest in the state.

10:40:49AM 10 So the person that was helping me, Jameson, he's
11 like just write a petition, you know, appeal to the Court of
12 Appeals. And that's what I did.

13 I would like to put this into evidence. This is
14 exhibit --

10:41:09AM 15 **THE COURT:** Pass it to me and I'll mark it.
16 Plaintiff's 2.

17 **THE CLERK:** Plaintiff's Exhibit No. 2 has been
18 marked.

19 **THE COURT:** Do you want to see it, Mr. Benitez?

10:41:52AM 20 **MR. BENITEZ:** Thank you, Judge.

21 **THE COURT:** Are you moving its admission?

22 **MR. LIVINGSTON:** Yes, I would like to put it in
23 evidence.

24 **THE COURT:** Mr. Benitez?

10:42:50AM 25 **MR. BENITEZ:** Just for the record, I'm going to

1 object upon it being hearsay and prejudicial and bolstering
2 grounds.

3 **THE COURT:** Okay, do you want to approach side bar?
4 You can come off the stand for a second.

10:43:13AM 5 (WHEREUPON, a discussion was held at side bar out
6 of the hearing of the jury.)

7 **THE COURT:** Do you want this all in?

8 **MR. LIVINGSTON:** Yes.

9 **THE COURT:** Why?

10:43:33AM 10 **MR. LIVINGSTON:** Because like I was testifying,
11 they might want to see what I was talking about, you know, the
12 issue and see the exhibit existed as I said.

13 **THE COURT:** Well, I think you can stipulate to that,
14 right? That there was a petition. I'm concerned summary of
10:43:51AM 15 the case and information here, that's going to be destructive
16 to you.

17 **MR. LIVINGSTON:** I don't understand why it would
18 be.

19 **THE COURT:** This is the whole background here that
10:44:01AM 20 I've already ruled should not be gotten into.

21 **MR. LIVINGSTON:** So we can discard that part or --

22 **THE COURT:** I don't know why you gain anything by
23 having the whole petition in. There's a stipulation you want
24 before the jury that you filed the petition for writ of error
10:44:18AM 25 coram nobis, correct?

1 **MR. LIVINGSTON:** Right.

2 **THE COURT:** Why do you need the writ itself?

3 **MR. LIVINGSTON:** I don't know, maybe the jury want
4 to see it, I don't know if they want to. They might be
10:44:28AM 5 curious what I'm speaking about.

6 **THE COURT:** There will be a stipulation I think.

7 **MR. BENITEZ:** I can stipulate.

8 **THE COURT:** The petition was filed. I think it's
9 going to be prejudicial to you to get this in. There's no
10:44:41AM 10 denial.

11 **MR. LIVINGSTON:** So which part would you say?

12 **THE COURT:** Well, the whole background regarding
13 what you were convicted of and the facts of that is all in
14 here.

10:44:58AM 15 **MR. LIVINGSTON:** You talking about the actual crime
16 itself?

17 **THE COURT:** Right, it's in all here. I don't know
18 what you gain by putting this in other than they already know
19 you filed this petition. If there's a stipulation, I gave
10:45:19AM 20 them an instruction that there was a petition for writ of
21 error coram nobis filed with the Second Department. I don't
22 know what the date is, but -- accomplishes the same purpose,
23 right?

24 **MR. LIVINGSTON:** I don't know. I'm -- I don't see
10:45:37AM 25 no harm in it because they know I'm in prison for a long time,

1 so they probably put two and two together saying this is what
2 I said, you know. So I don't know. But it's up to you. I
3 would like to put it in there.

4 **THE COURT:** You want it in there with the facts
10:45:55AM 5 regarding the background of your crime?

6 **MR. LIVINGSTON:** Yeah.

7 **THE COURT:** You don't care about that?

8 **MR. LIVINGSTON:** No.

9 **THE COURT:** I'm making it clear I think it's
10:46:01AM 10 prejudicial to you, but you want it in there?

11 Any objection?

12 **MR. BENITEZ:** No objection, Judge.

13 **THE COURT:** All right.

14 (**WHEREUPON**, side bar discussion concluded.)

10:46:28AM 15 **THE COURT:** Plaintiff's 2 will be received.

16 (**WHEREUPON**, Plaintiff Exhibit 2 was received into
17 evidence).

18 **MR. LIVINGSTON:** Like I said, I filed it -- I filed
19 the error coram nobis, the Second Department denied it. They
10:46:59AM 20 didn't specifically say why they denied it.

21 Then I know that they probably would have because
22 they usually leave these kind of petition to the -- to the
23 highest court in the state, New York State Court of Appeals.

24 So all I had to do was file appeal of that
10:47:32AM 25 decision. And I did that with a letter -- in letter form I

1 think it's to Judith -- Honorable Judith Kaye, she's a nice
2 lady.

3 I like to put -- submit this in as exhibit. It's
4 1.

10:48:02AM 5 **THE COURT:** Mark this as Plaintiff's Exhibit 1.

6 **THE CLERK:** Plaintiff's Exhibit 1 has been marked.

7 **THE COURT:** Mr. Benitez?

8 **MR. BENITEZ:** Thank you, Judge. No objection, Your
9 Honor.

10:49:27AM 10 **THE COURT:** Move the admission of Plaintiff's
11 Exhibit 1?

12 **MR. LIVINGSTON:** Yes.

13 **THE COURT:** It will be received.

14 (WHEREUPON, Plaintiff Exhibit 1 was received into
10:49:38AM 15 evidence).

16 **MR. LIVINGSTON:** So I filed a appeal of that Court's
17 decision with Judge Judith Kaye. In it I spelled out in a
18 abbreviated form of what Exhibit 2 was arguing.

19 Basically I told her that the appellate lawyer
10:50:16AM 20 didn't submit some very good issue that had merits when he
21 should have, that would have got me reversed from my
22 conviction.

23 And I -- when I submitted it, I didn't -- I didn't
24 send this or Exhibit 2 with my application. So they call this
10:50:49AM 25 a leave application.

1 So the court clerk sent that letter that I been
2 disputing all morning and prior, the July 26th letter and
3 envelope. They sent that to me telling me that I must submit
4 additional submission they call it, they didn't spell it out
10:51:19AM 5 for me, but during my research I find out what they meant by
6 additional submission.

7 And I like to submit Exhibit 20.

8 **THE COURT:** Exhibit 20.

9 **THE CLERK:** Plaintiff's Exhibit 20 has been marked.

10:52:07AM 10 **MR. BENITEZ:** I have no objection.

11 **THE COURT:** You move its admission?

12 **MR. LIVINGSTON:** Yes, but --

13 **THE COURT:** Plaintiff's Exhibit 20 will be received.

14 (WHEREUPON, Plaintiff Exhibit 20 was received into
10:53:31AM 15 evidence).

16 **MR. LIVINGSTON:** Can I say something on the
17 record -- off the record?

18 **THE COURT:** Do you want to approach?

19 **MR. LIVINGSTON:** Yes.

10:53:40AM 20 **THE COURT:** Sure.

21 (WHEREUPON, a discussion was held at side bar out
22 of the hearing of the jury.)

23 **MR. LIVINGSTON:** The reason I don't know if they
24 gonna look at the whole book, that's why -- remember we was
10:54:00AM 25 speaking before about just the relevant part, pertinent part

1 and I marked the part that I want to read. They might, you
2 know, he said mark it just, but you can just give them the
3 pages that I want that's relevant to what I'm testifying to.

4 **MR. BENITEZ:** I have no objection to the
10:54:24AM 5 completeness, I mean, I want the whole thing in.

6 **MR. LIVINGSTON:** Okay.

7 **THE COURT:** Okay.

8 **MR. LIVINGSTON:** Okay, the whole thing then.

9 **THE COURT:** Exhibit 20 is received in total.

10:54:39AM 10 (**WHEREUPON**, side bar discussion concluded.)

11 **MR. LIVINGSTON:** Before I get to that I might have
12 skipped a pertinent -- I like to put Exhibit 5.

13 **THE COURT:** Mark Plaintiff's Exhibit 5.

14 **THE CLERK:** Plaintiff's Exhibit 5 has been marked.

10:56:10AM 15 **MR. BENITEZ:** No objection, Your Honor.

16 **THE COURT:** You move its admission?

17 **MR. LIVINGSTON:** Yes.

18 **THE COURT:** Plaintiff's 5 will be received.

19 (**WHEREUPON**, Plaintiff Exhibit 5 was received into
10:56:32AM 20 evidence).

21 **MR. LIVINGSTON:** Like I said, after I submitted my
22 application for leave to appeal the lower court's decision,
23 denial of the writ of error coram nobis, the clerk of New York
24 State Court of Appeals sent me a letter dated July 26th, 2006,
10:57:05AM 25 and in this letter it says -- it say your application for

1 certificate permitting a further appeal has been assigned to
2 the Honorable Judith S. Kaye, Chief Judge of the Court of
3 Appeals, Court of Appeals, 20 Eagle Street, Albany, New York,
4 and the zip code.

10:57:31AM 5 The papers you have submitted on the application
6 are being forward to the assigned judge. Additional
7 submissions, if any, must be mailed within three weeks --
8 remember the three weeks, please -- after the date of this
9 letter and copy must be served on the adverse party.

10:57:55AM 10 Any responsive communication must be mailed within
11 two weeks after the due date for the applications. Additional
12 submission with they copy also served on adverse party,
13 particular written attention should be given to identifying
14 reviewability and preservation issues, rules of practice,
10:58:20AM 15 Section 500.20A and it's signed by Stewart M. Cohen, I guess
16 he's the chief of Clerk of the Court at the time.

17 Then it got the Kings County district attorney's
18 name and address on it, Charles Hines on it. Now, this
19 letter, this what this lawsuit is about because they -- they
10:58:54AM 20 held it for three weeks and I had three weeks to submit the
21 additional documents.

22 So they held it past the due date for the
23 submission of the additional submissions.

24 Now, they rules -- the rules of that court, Court
10:59:20AM 25 of Appeals, rules of practice, which is marked Exhibit 20 into

1 evidence, all right.

2 According to the court rules --

3 **THE COURT:** What rule are you reading from?

4 **MR. LIVINGSTON:** Right now, reading from 5.6,

11:00:22AM 5 primary election session procedures. It says motion for
6 permission to appeal. That's what I submitted to that court.
7 Permission to appeal. It says within -- section B, paragraph
8 3 it says within the time directed by the Court -- by the
9 Clerk of the Court movant shall file ten copies of movant's
11:00:55AM 10 Appellate Division brief. That's what initiated the writ in
11 the lower court. And where applicable the record or appendix.
12 The original file with applicable which movant shall obtain.

13 Then another rule states under criminal leave
14 application, Section 5.20 criminal leave application, that's
11:01:35AM 15 the one I should have read -- Section 2 of that same rule
16 states orders of intermittent appellate court determine
17 application for writ of error coram nobis. That's what I
18 filed.

19 An application for leave to appeal from an
11:02:17AM 20 intermediate appellate court order determining application for
21 error coram nobis relief shall include the order and decision
22 sought to be appealed from; two, the papers in support of
23 opposing the application filed in the intermediate appellate
24 court; and the intermediate appellate court Decision and Order
11:02:45AM 25 sought to be vacated as well as the briefs filed on the line

1 of appeal.

2 That's what they meant when they asked for
3 additional submission. They wanted me to file the actual
4 writ, which is marked Exhibit 2; and also the DA's submission
11:03:18AM 5 with my application for leave.

6 And they said -- and this part is what would happen
7 if I don't submit it in the time that they describe. 500.16,
8 failure to proceed or file papers. Dismissal of appeal,
9 that's what would happen.

11:03:52AM 10 If appellant has not filed or served the papers
11 required by Section 5.11, 5.12 or 5.26(a) of this part within
12 the time set by the Clerk's Office or otherwise prescribed by
13 this court, the Clerk of the Court shall enter an order
14 dismissing the appeal. That's what happened when I couldn't
11:04:20AM 15 submit the paper to the court.

16 They dismissed it, they didn't even get to the
17 merit of it.

18 **MR. BENITEZ:** Objection, misrepresentation of facts
19 there, Judge. There's nothing in the --

11:04:34AM 20 **THE COURT:** Sustained. That will be stricken. The
21 last part will be stricken.

22 **MR. LIVINGSTON:** So when I didn't receive that
23 paper, that letter dated July 26th, I couldn't -- I didn't --
24 I didn't know that the Court wanted these papers because I
11:05:04AM 25 didn't receive the papers.

1 When the defendants finally gave me the paper on
2 August 17th, I didn't know what to do. I was -- I didn't know
3 what to do. I was like, man, what they do this, not again.
4 Always something with this case, right?

11:05:48AM 5 So when they gave me the letter, I tried to contact
6 Mr. Cohen of the Court of Appeals and tell him that I just
7 received the letter and can I have extension of time to file
8 these additional submissions they requested.

9 I like to put this in.

11:06:36AM 10 **THE COURT:** This is Plaintiff's 21.

11 **THE CLERK:** Plaintiff's Exhibit 21 has been marked.

12 **MR. BENITEZ:** No objection.

13 **THE COURT:** You move its admission?

14 **MR. LIVINGSTON:** Yes.

11:07:06AM 15 **THE COURT:** Plaintiff's 21 will be received.

16 (**WHEREUPON**, Plaintiff Exhibit 21 was received into
17 evidence).

18 **MR. LIVINGSTON:** I like to read what it says. Got
19 my name, the address of Elmira, got Stewart M. Cohen, clerk,
11:07:31AM 20 New York State Court of Appeals, 20 Eagle Street, Albany, New
21 York 12207.

22 And Re: The subject: People vs. Livingston,
23 application for leave dated the 21st of August 21st, 2006.

24 It says Dear Mr. Cohen: I just received the letter
11:07:59AM 25 you sent me informing me that my application was assigned to

1 the Honorable Judge Judith S. Kaye. After reading your letter
2 I realized that the letter -- I realized that the time limit
3 to file additional submission in quotation has expired. I'm
4 writing to inquire about whether or not I can obtain a time
11:08:26AM 5 extension to submit additional information to Judge Kaye.

6 Sincerely yours, I signed it and copy.

7 In response to that letter a deputy clerk out of
8 the Court of Appeals sent me a letter dated August 28th, 2006.
9 I like to put this --

11:08:58AM 10 **THE COURT:** Mark this Plaintiff's Exhibit 22.

11 **THE CLERK:** Plaintiff's Exhibit 22 has been marked.

12 **MR. BENITEZ:** Judge, my only exception to this
13 exhibit would be for incompleteness, it references a copy of a
14 certificate denying leave is enclosed. I do have a copy of
11:09:50AM 15 the enclosure if he would like to have the complete exhibit.
16 I would have no objection to the complete exhibit.

17 **THE COURT:** Pass it back up. Have you seen this?

18 **MR. LIVINGSTON:** I was going to submit a copy of
19 that.

11:10:19AM 20 **THE COURT:** Let's submit it together then, all
21 right? So 22 will be received, which is a letter dated
22 August 28th, and also a certificate denying. So it will be a
23 two-page exhibit.

24 (WHEREUPON, Plaintiff Exhibit 22 was received into
11:10:42AM 25 evidence).

1 **MR. LIVINGSTON:** I received a response to that --
2 to that letter I wrote, that August 21st, 2006 letter I wrote
3 to the clerk office from Marjorie S. McCoy I think it is,
4 deputy clerk. It got -- it's officially got the seal of the
11:11:24AM 5 court and it got Clerk's Office and Appellate New York address
6 and all of that.

7 And it's dated August 28th, 2006.

8 And it got my name, number, Elmira Correctional
9 Facility address, re: It says People vs. Detroy Livingston.
11:11:50AM 10 It says Dear Mr. Livingston: This acknowledges receipt of your
11 letter dated August 21st, 2006 requesting an extension of time
12 to file additional submission.

13 On August 17th, 2006, Chief Judge Judith S. Kaye
14 denied leave to appeal in the above entitled matter. A copy
11:12:18AM 15 of the certificate denying leave is enclosed.

16 Very truly yours, Marjorie S. McCoy signed it.

17 Now, I like to make a point now. That letter
18 that's been disputed all morning since this trial started
19 yesterday and all that, that they keep a current -- that
11:12:47AM 20 August 17th, 2006, that's the current date. That's what
21 alerted me that something afoul went -- happened to that
22 letter and the reason why, if you remember, that letter was
23 stamped on it August 17th, 2006.

24 That's the same date that Judge Kaye denied my
11:13:19AM 25 application. So it's like coincidence or if you want to call

1 it coincidence, I don't know what you call that.

2 But that's -- that's the three weeks from the date
3 that they wanted a submission. I figured the three weeks
4 would have ended on August 16th. And since the Court didn't
11:13:50AM 5 receive my submission, the next day the judge say, well, you
6 not submitting what we asked for, so only thing left is to
7 deny it because we can't -- they can't really look into the
8 matter as I state it in my application to her.

9 So she denied it on the next day on August 17th. I
11:14:17AM 10 don't know -- and I don't know what happened, how the date is
11 similar, but I think it's a connection there to those similar
12 dates.

13 Because on the same August 17th, 2006, they held
14 the letter from me for three weeks knowing that I had three
11:14:47AM 15 weeks to submit these documents to the Court.

16 They saying they didn't hold it, but the evidence
17 showed that they held it, delayed it, even there's been
18 testimony that the letter was delayed. Two people said it was
19 delayed.

11:15:07AM 20 **MR. BENITEZ:** Objection, Your Honor, that's
21 misrepresentation of the facts.

22 **THE COURT:** Yes, sustained, that will be stricken.

23 **MR. LIVINGSTON:** If I'm not mistaken, defendant
24 Bills said it was delayed.

11:15:23AM 25 **MR. BENITEZ:** Objection. Same --

1 **THE COURT:** Sustained. That will be stricken.

2 Ladies and gentlemen, it's going to be up to you to determine
3 what the facts are based upon what you determine to be the
4 credible testimony.

11:15:33AM 5 You may proceed.

6 **MR. LIVINGSTON:** And if I had gotten that letter at
7 the prescribed time that it was mailed, which should have been
8 like three to four days, my other -- the letter from Judith
9 Kaye, Judge Judith Kaye -- is this in evidence, 6? May I see
11:16:10AM 10 it?

11 **THE COURT:** Exhibit 6 is received?

12 **THE CLERK:** Mm-hmm.

13 **THE COURT:** That's an envelope?

14 **MR. LIVINGSTON:** Yes. May I see it, please? I
11:16:24AM 15 think it's over there. Do you want me to get it?

16 **THE CLERK:** I can.

17 **MR. LIVINGSTON:** The letter from Judge Kaye's
18 chambers, it was Bowes stamp, the Pitney Bowes stamp on
19 August 24th, 2006. And then the New York State -- I mean the
11:17:12AM 20 United State Post Office for some reason post another stamp
21 over that Bowes for August 25th. I guess that's the date they
22 received it.

23 So it was postmarked on August 25th and it got to
24 Elmira, according to the stamp on it, three days later. And
11:17:34AM 25 that came from New York City.

1 So the one -- the July 26th one, it took 22 days to
2 come from Albany. And that's like three weeks from the day it
3 was Bowes stamped or Pitney Bowes stamped.

4 So why it took that long? So it had to been a
11:18:01AM 5 delay. It was a delay.

6 I was denied access to court because of that delay.
7 I couldn't get the paperwork that the Court needed to review
8 the merit of my argument. So I was denied access to the court
9 in that way.

11:18:40AM 10 That's it.

11 **THE COURT:** Okay. Thank you. Mr. Benitez?

12 **CROSS-EXAMINATION**

13 **BY MR. BENITEZ:**

14 Q. Mr. Livingston --

11:19:04AM 15 A. Yes.

16 Q. -- besides this particular application to the court for
17 leave, for permission to file the appeal to the Court of
18 Appeals, besides that one, did you ever file any other appeals
19 regarding your underlying conviction?

11:19:20AM 20 A. Did many.

21 Q. And, in fact, you did many toward -- in the state and
22 federal courts; is that correct?

23 A. I did one in the federal courts. I did other error coram
24 nobis in the state.

11:19:35AM 25 Q. And what were the results of those appeals?

1 A. Those appeals was denied.

2 Q. And, in fact, is it true that the federal court dismissed
3 your appeal based upon your argument of an ineffective
4 counsel; is that correct?

11:20:04AM 5 A. I don't remember. It was -- I think I put plenty things
6 in there, couple arguments in there.

7 Q. And that was one of the arguments?

8 A. I don't remember.

9 Q. Okay. You don't remember?

11:20:20AM 10 A. No.

11 Q. Okay. Do you remember receiving responding papers from the
12 District Attorney's Office on that case, the federal case?

13 A. On the federal case, the *habeas corpus*?

14 Q. Yes.

11:21:07AM 15 A. Yes.

16 Q. Okay. And do you remember the argument presented by the
17 district attorney stating that the District Court found your
18 claim of ineffective counsel to be meritless?

19 A. I don't remember.

11:21:26AM 20 Q. Okay. That doesn't refresh your memory?

21 A. No. That was -- that was when? When did I file that? In
22 the nineties?

23 Q. I want to just show you an Exhibit for identification
24 purposes, only for the purpose of refreshing your memory if it
11:21:51AM 25 does. I'm going to have this marked first.

1 **THE COURT:** 408?

2 **MR. BENITEZ:** Yes, Judge.

3 **THE CLERK:** Defendants' Exhibit No. 408 is marked.

4 **BY MR. BENITEZ:**

11:22:37AM 5 Q. Mr. Livingston, I've just handed to you what's been marked
6 as Defendants' Exhibit 408 for identification purposes. Could
7 you take a moment to review that?

8 A. Yeah, but this is not the federal *habeas corpus* response
9 you speaking about. This is response from -- from the court
11:22:54AM 10 about this issue that I filed with the Second Circuit, the
11 writ of error coram nobis.

12 Q. Okay. Okay. Well, if you review that, I would like to
13 know if that -- that would refresh your memory about the U.S.
14 District Court's decision regarding your claim of ineffective
11:23:13AM 15 counsel? Take -- go through the pages, please?

16 A. Is there a specific paragraph you want me to --

17 Q. Yes. Let me approach.

18 A. That might be it right there.

19 Q. 19.

11:25:04AM 20 A. Yeah, I see that, mm-hmm.

21 Q. Does that refresh your memory as to the court's decision
22 on your claim of ineffective counsel?

23 A. Yes.

24 Q. Okay. And how does it refresh your memory?

11:25:15AM 25 A. I guess I put in a pro se supplemental brief telling them

1 that I was ineffective -- counsel was ineffective at trial, at
2 my trial.

3 Q. Okay. Does it reflect -- do you remember or does it
4 refresh your memory as to the United States District Court's
11:25:37AM 5 decision finding that your claim of ineffective counsel was
6 meritless?

7 A. That's what it says right here, yeah.

8 Q. I'm not asking what it states there. I'm asking if it
9 refreshes your own independent recollection?

11:25:50AM 10 A. No.

11 Q. Thank you.

12 MR. BENITEZ: Judge, I have nothing further.

13 THE COURT: Anything further?

14 MR. LIVINGSTON: Yes.

11:26:15AM 15 REDIRECT EXAMINATION

16 MR. LIVINGSTON: I've been trying to fight this for
17 28 years, tell everybody that I can -- that I don't know what
18 happened during this crime, I wasn't there and I'm innocent.
19 I was railroaded, telling everybody that I can.

11:26:33AM 20 And when I filed this writ of error coram nobis,
21 this the first time in all my years of litigating my stuff
22 that the court sent a letter saying they want additional
23 submission. No, no other time did they ever send a letter and
24 say send the papers. So I knew after receiving that letter
11:26:59AM 25 saying sending more papers, I knew this issue was strong right

1 here because all my -- I got 28 years, almost 28 years, none
2 of the court ever said send other papers.

3 So I knew this was a strong issue right here. And
4 I was gonna go home if I had opportunity to send these papers.

11:27:21AM 5 And by not getting this letter, messed up even
6 further my whole life by not getting this paper so I could
7 have send the court these papers.

8 So I did -- did numerous, I did error coram nobis
9 before telling them that they violated my right by not giving
11:27:52AM 10 me a better lawyer.

11 During my direct appeal a lady named Cynthia Finn,
12 she was the first lawyer they gave me and she did a excellent
13 job. She filed two issues, they were strong, very strong. It
14 was -- I was trying to remember what the issues are.

11:28:23AM 15 May I see it again, that paper?

16 **THE COURT:** What are you looking for?

17 **MR. LIVINGSTON:** The --

18 **MR. BENITEZ:** It's not in evidence.

19 **MR. LIVINGSTON:** Okay, it's not in evidence. I'll
11:28:34AM 20 leave it like that. I can remember it, I can remember it.

21 The issue was the evidence was inefficient to
22 convict, that was one of the issues, she only put two issues
23 in. The other issue was pre-indictment delay was wrongfully
24 denied because they took three and a half years to even bring
11:29:05AM 25 me to court. They knew where I was, I wasn't on the run, they

1 wasn't looking for me. And some person said my name in the
2 crime.

3 And in three and a half years, they never arrested
4 me, they didn't even come ask me questions, nothing. So
11:29:29AM 5 Ms. Finn, Miss Cynthia Finn, she put that in the brief and
6 that was on direct appeal.

7 I also submitted a supplemental brief telling them
8 at that time I didn't know how to do law like I do now. I
9 still don't know how to do law, but at that time I was like
11:29:49AM 10 clueless and I put some things in. I put in the ineffective
11 assistance of counsel, I wrote that, the lawyer didn't do
12 that.

13 So it was like jumbled in. I think I put in that I
14 didn't get the proper amount of peremptory challenges. You
11:30:18AM 15 all just went through that, it was like challenging the jurors
16 who you wanted to put on the jury. And during criminal trials
17 you have certain amount of peremptory challenge. I can say I
18 don't know, that I don't want that, I don't want that person
19 and they gone. And that was my argument, one of them.

11:30:37AM 20 And then I also put in another argument that I
21 didn't get my Sixth Amendment right to confront the witnesses
22 against me. That was a good argument, but I didn't know how
23 to argue it. I just put my co-defendant said he was going to
24 testify against me, but then the lawyer and the judge and the
11:31:10AM 25 district attorney told the jurors, yeah, this guy's going to

1 testify against him and corroborate what this person is
2 saying.

3 That never happened. He never got on the stand and
4 did nothing. He testified to nothing. He didn't lie or
11:31:24AM 5 nothing. He just plain didn't testify. And nobody came and
6 told them, yo, the reason he's not testifying is 'cuz we found
7 out he lied or nothing. Nothing, no correction, they just
8 left it like that, so I wrote it up as that saying my right
9 was denied, my right to confront my witness was denied.

11:31:48AM 10 But like I said, I didn't know how to do it then,
11 write the law up and things. So I just jumbled it together
12 with the other one and so they, you know, they dismissed it.

13 So when -- when Ms. Finn, after Ms. Finn, Cynthia
14 Finn did her brief and put those two arguments in, for some
11:32:20AM 15 reason I don't know what happened, she was off the case. It
16 was a mystery to me, too, they appointed this dude from
17 another office named Kevin Casey I think his name is, and when
18 he came aboard he didn't put his own brief in, that's like
19 legal arguments, it's called a brief.

11:32:46AM 20 And he didn't put his own brief in so he -- I guess
21 he argued in front of the Appellate Division what she had
22 briefed. I don't know. But later I found out that he didn't
23 because when the Appellate Division denied those issue, he put
24 in a leave application to, you know, Court of Appeals.

11:33:15AM 25 And in this leave application he totally

1 disregarded that insufficient of evidence convict issue. He
2 didn't even put that. He just left that out clearly. But --
3 and he changed the other issue from the pre-indictment three
4 years, three and a half years delay, he changed that whole
11:33:40AM 5 issue around to a speedy trial and that wasn't the argument
6 she put in there. A speedy trial and three years and a half
7 delay is totally difference from speedy trial.

8 So the judges, they was like this wasn't argued in
9 the lower court. And that's one of they criteria to dismiss
11:34:06AM 10 your appeal if the lower court don't have notice of it, those
11 issue, they totally disregard it and they got a name for it,
12 procedural bar, and that's what the federal *habeas corpus* that
13 he's brought up just now, when I brought it -- I did that
14 pro se because you don't have a right to do that so, you know,
11:34:33AM 15 you're not -- you won't be given lawyers. So either you pay
16 for a lawyer or you try to get one or you do it yourself. So
17 I did that myself and I placed the issue that Ms. Finn,
18 Cynthia Finn, had placed in her thing, in her brief and submit
19 and the little things I knew submitted that, including the
11:34:56AM 20 ineffective assistance of counsel that he spoke about, I put
21 that in the federal *habeas corpus*.

22 And tell them I need, you know, this what happened
23 and they wrote me back and said these are procedural bar. If
24 you look at it, it's not in evidence, but if you look at that
11:35:14AM 25 exhibit it will say it right there, it was procedural bar

1 because, again --

2 **MR. BENITEZ:** Objection, Your Honor, that's a
3 misstatement of the facts.

4 **THE COURT:** If you would like that into evidence,
11:35:24AM 5 I'll be more than happy to move it in.

6 **MR. LIVINGSTON:** Yes, I don't have no --

7 **THE COURT:** What exhibit is that? 408?

8 **MR. BENITEZ:** Yes, it's Defendants' Exhibit 408.

9 **THE COURT:** What is it?

11:35:35AM 10 **MR. BENITEZ:** Affirmation in opposition to writ of
11 error coram nobis and this is what was presented by an
12 attorney, Assistant District Attorney out of Kings County and
13 in there it lays out procedural and factual background.

14 **THE COURT:** Thank you. 408 will be received.

11:35:57AM 15 (**WHEREUPON**, Defendants' Exhibit 408 was received
16 into evidence).

17 **MR. LIVINGSTON:** May I see it now?

18 **THE COURT:** Yes. You've seen it before?

19 **MR. LIVINGSTON:** Yeah, I've seen it. Let me take a
11:36:11AM 20 minute to look at this, the part that I want.

21 All right, on page 6, paragraph 18, it says by
22 order date of August 23rd, 1995, the District Court denied
23 defendant's *habeas corpus* petition on the grounds that several
24 of his claims were procedural bar. That's why they deny it
11:36:55AM 25 because it was procedural bar from *habeas corpus* review.

1 And his ineffective assistance counsel claim is --
2 claims were meritless. So I didn't misstate. It says it
3 right there, it was procedural bar.

4 **MR. BENITEZ:** Objection, Your Honor. The statement
11:37:15AM 5 is two parts.

6 **THE COURT:** Overruled. The document's in evidence,
7 the jury can consider that at the appropriate time.

8 **MR. LIVINGSTON:** Yeah. I didn't -- that
9 *habeas corpus* right there, I didn't get to appeal it. It's
11:37:36AM 10 another step to appeal, you know, the District Court decision.
11 You could take it to the Second Circuit, that's like the
12 highest federal court in New York, the Eastern District. It's
13 in Brooklyn, I think, or Manhattan -- no, it's in Manhattan.

14 So I didn't get to appeal that because ironically I
11:38:04AM 15 didn't get that letter soon enough, so I didn't get to appeal
16 that, but they probably would have said the same thing because
17 those issues wasn't given to the lower court because, like I
18 said, when Kevin Casey came aboard he didn't submit Mrs. Finn
19 brief like she had laid it out.

11:38:32AM 20 Oh, yeah, and I did a error coram nobis regarding
21 that issue, too, because I said Kevin Casey was ineffective,
22 he's the ineffective appellate counsel because when he receive
23 Ms. Finn brief, it was no reason for him to disregard what she
24 had wrote in there. It was no reason for him to not submit
11:39:05AM 25 ineffective, insufficient evidence to convict argument, and it

1 was no reason for him to change the pretrial delay, the three
2 and a half years, three and a half year pretrial delay to a
3 speedy trial. It was no reason. So I submitted error coram
4 nobis in that.

11:39:30AM 5 But what's difference from that error coram nobis
6 and the one that -- that's important to this case right here
7 is in that case the court didn't send me a letter telling me
8 to send them the other papers like in this case.

9 In this case, they sent me that letter so they
11:39:56AM 10 wanted to see what I was talking about, they wanted, they
11 wanted these 200 pages so they could see what I was talking
12 about.

13 And they, I guess they didn't get the gist of it,
14 the full gist of it in this, in this 13 pages. They wanted to
11:40:14AM 15 see the whole thing.

16 And then when I didn't send it to them, they just
17 dismissed my case, like they rule book says they would.

18 Basically that's it.

19 **THE COURT:** Thank you.

11:40:33AM 20 **MR. BENITEZ:** Nothing further, Your Honor.

21 **THE COURT:** Thank you, you may step down. Thank
22 you.

23 (**WHEREUPON**, the witness was excused).

24 **THE COURT:** Ladies and gentlemen, at this time we're
11:40:41AM 25 going to take a recess. I'm asking you not to discuss the

1 matter or allow anybody to discuss the matter with you. The
2 jury may step down, we'll stand in recess.

3 (WHEREUPON, the jury was excused).

4 THE COURT: A court security officer or one of the
11:41:26AM 5 guards, can you approach side bar for a second? This does not
6 need to be on the record.

7 (WHEREUPON, there was a discussion off the record.)

8 THE COURT: Mr. Livingston, are you going to rest at
9 this point?

11:42:50AM 10 MR. LIVINGSTON: Yes, sir.

11 THE COURT: Okay.

12 MR. LIVINGSTON: May I say one thing?

13 THE COURT: Sure.

14 MR. LIVINGSTON: You never got back to me about
11:43:01AM 15 Ms. Daugherty.

16 THE COURT: What do you need her for?

17 MR. LIVINGSTON: To verify certain thing like, you
18 know, because she send me letters that used the -- that Pitney
19 Bowes thing and also -- yeah, she sent me letters at that time
11:43:18AM 20 that -- that's relevant to the issue. And the directive

21 states certain things supposed to happen when you out to
22 court; and also ask if what's described in the directive if
23 she received those -- those notification from -- from Elmira.

24 THE COURT: Were those the same directives you put
11:43:48AM 25 into evidence?

1 **MR. LIVINGSTON:** Yes, but I'm trying to show --
2 wanted to show by her because she's actually -- she knows like
3 relevant parts of it because in the directive it says that
4 they will be notified if I'm out to court, they will be
11:44:09AM 5 notified. And I want to ask her if she notified at any point,
6 you know, according to that that -- they directive that --

7 **THE COURT:** It sounds like that would be strictly
8 hearsay information. I don't see how that could possibly come
9 into evidence. Do you have any other reason to call her?

11:44:33AM 10 **MR. LIVINGSTON:** Oh, yeah, I wanted to ask her like
11 who -- like how she get her -- how she get her notification
12 from the courts, like do they mail it by the slow mail, the
13 snail mail they call it, or e-mail it or fax it and that's
14 relevant because I want -- I want to use that to show that
11:45:08AM 15 certain parties was privy that these letters -- the July 26th
16 letter was on its way and that's why I was delayed because
17 they had further -- prior notice that it was on its way, and
18 not to release it until certain further notice.

19 **THE COURT:** Who had prior notice?

11:45:38AM 20 **MR. LIVINGSTON:** That's -- that's what the
21 testimony will draw out, like what attorney of either the
22 opposition or the adverse party will have prior notice before
23 me, like say because I'm in prison I don't have, you know, all
24 that technology just going on now, I have to get my letters
11:46:04AM 25 through the U.S. Postal Service.

1 The attorney and adversary get prior notice like
2 through fax, they will get it the same day it's out. Like say
3 you want to send attorney a letter dated today, you will
4 probably -- or your secretary probably put it in the fax
11:46:27AM 5 machine and they will get it that day. Me, I will probably
6 have to wait three or four days so --

7 **THE COURT:** Was she representing you during this
8 time?

9 **MR. LIVINGSTON:** Yes.

11:46:37AM 10 **THE COURT:** In 2006?

11 **MR. LIVINGSTON:** Yes.

12 **THE COURT:** On this matter?

13 **MR. LIVINGSTON:** On this matter?

14 **THE COURT:** Right.

11:46:42AM 15 **MR. LIVINGSTON:** No.

16 **THE COURT:** What did she represent you on?

17 **MR. LIVINGSTON:** I think the Second Circuit and
18 reverse 1983 lawsuit and she happened to -- I don't know if
19 she -- I don't know how she was appointed, but she was
11:46:59AM 20 appointed by this court, I think Larimer.

21 **THE COURT:** Are you talking about the District Court
22 system vs. State court system? District Court has electronic
23 filing. Different story than the State system, which does
24 not.

11:47:14AM 25 **MR. LIVINGSTON:** Does not what?

1 **THE COURT:** Have electronic filing. New York State
2 court system does not have electronic filing.

3 **MR. LIVINGSTON:** Electronic filing. Oh, so they --
4 so the attorney will get notice on the same day with me?

11:47:29AM 5 **THE COURT:** A letter?

6 **MR. LIVINGSTON:** A letter.

7 **THE COURT:** That's right.

8 **MR. LIVINGSTON:** Okay, that was the issue right
9 there to see if it is different.

11:47:36AM 10 **THE COURT:** Anything else?

11 **MR. LIVINGSTON:** Regarding her? Or any -- no.

12 **THE COURT:** Okay. All right. Okay, we'll take a
13 recess.

14 **MR. BENITEZ:** Okay. Judge, upon the return from
11:48:03AM 15 recess can I make my motion Rule 50(a) motion?

16 **THE COURT:** Yeah, Rule 50?

17 **MR. BENITEZ:** Yes, Rule 50. Thank you, Judge.

18 **THE COURT:** Okay.

19 (WHEREUPON, there was a pause in the proceeding.)

12:02:13PM 20 **THE COURT:** Plaintiff has rested. Mr. Benitez, you
21 have a motion?

22 **MR. BENITEZ:** Yes, I do, Judge. On behalf of
23 defendants Bills, Ms. Whitten and Gates, Ms. Gates, pardon me,
24 I respectfully move pursuant to Federal Rules of Civil
12:06:05PM 25 Procedure Rule 50 for judgment as a matter of law on three

1 independent and separate bases.

2 One, is the fact that plaintiff has failed to prove
3 through any credible evidence, let alone any evidence, that
4 there was any personal involvement by any of these three
12:06:25PM 5 supervisory level employees. As the evidence showed,

6 Mr. Bills at the time was a senior counselor who has held that
7 position and had a supervisory position over in the mail room.

8 Likewise, Ms. Gates was a senior law clerk who held
9 a supervisory position over other law clerks in the office.

12:06:48PM 10 **THE COURT:** You mean mail clerks?

11 **MR. BENITEZ:** Other mail clerks, excuse me. She
12 was a senior mail clerk, excuse me. I misspoke.

13 And, lastly, Ms. Whitten was the deputy
14 superintendent for programs at the facility who supervised all
12:07:03PM 15 programs at the facility. Specifically, in 1983 cases

16 personal involvement is required of the defendant in an
17 alleged constitutional deprivation. It's a prerequisite
18 that's cited at *Rossi vs. Stevens*, that's 2005 U.S. District
19 Lexis 47198. It's a Southern District case, 2005, and it's
12:07:41PM 20 citing a Second Circuit *Williams vs. Smith*, 781 Federal
21 Circuit 319.

22 Second basis, Your Honor, is lack of sufficient
23 evidence, lack of any evidence and proof to substantiate any
24 of the elements of the denial of prisoner's right to access to
12:08:07PM 25 court.

1 Specifically, the first element has been supported
2 as recent as by the Western District of New York
3 September 12th, 2013, *Myers vs. Dolac*, that's 2013 U.S.
4 *District Lexis 130677*, citing *Cancel vs. Goord*. In that
12:08:36PM 5 particular case it was cited, it states, in relevant portion,
6 that in order to survive a motion to dismiss and here we're at
7 the stage of all the proof being presented to the Court, a
8 plaintiff must allege not only the defendant's alleged conduct
9 was deliberate and malicious, but also that the defendant's
12:08:57PM 10 actions resulted in actual injury to the plaintiff such as the
11 dismissal of an otherwise meritorious claim.

12 Here the plaintiff and the proof utterly fails to
13 show that any of the three defendants were -- he hasn't been
14 able to impute any conduct of any of these three, let alone
12:09:19PM 15 their conduct was either intentional, malicious or deliberate
16 against him.

17 The evidence and the testimony by Ms. Gates was
18 that to her -- the best of her knowledge, she did not handle
19 his mail, the mail in question, which is the letter from the
12:09:35PM 20 New York State Court of Appeals. She had -- at no time had
21 involvement in the handling of that mail.

22 And as to the other two defendants, they were
23 never -- they never handled any of the mail for any inmate,
24 let alone Mr. Livingston.

12:09:53PM 25 Second element that -- that the plaintiff failed to

1 show is that -- that any of my clients' conduct, again,
2 there's no wrong conduct alleged by any of these three
3 defendants by the facts.

4 He's tried to impute conduct on a facility or on a
12:10:20PM 5 state entity. This is an individual -- these are individual
6 claims. And if you look at the individual claims against any
7 of these three individuals, there is no conduct that any of
8 these three did that hindered his efforts to pursue a
9 meritorious legal claim.

12:10:40PM 10 On that part as well the issue of meritorious legal
11 claim, the plaintiff's exhibit on that point there,
12 Plaintiff's Exhibit 22, is a certificate denying leave, which
13 is the permission to file an appeal. In that certificate, the
14 Court, Chief Judge Kaye, states in pertinent part that upon
12:11:08PM 15 the record and proceedings herein, there is no question of law
16 presented which ought to be reviewed by the Court of Appeals
17 and permission to appeal is hereby denied.

18 So it was after deliberating and upon the record in
19 the proceedings therein that the Court held that there was no
12:11:29PM 20 question of law.

21 It was never a statement by the judge stating that
22 it was a violation of a particular court rule, nor does the
23 Court state, as the plaintiff had suggested in his testimony,
24 nor that -- nor that it was based upon a delay in mail.

12:11:56PM 25 It was based on the merits and there was no

1 question of law presented.

2 At no time, I should point out, did any of my
3 clients -- were they aware of the contents of his legal mail.
4 There's no proof in the record to establish that at all.

12:12:20PM 5 Now, the fourth element would be the fact that the
6 plaintiff was bringing a claim that was not frivolous. Well,
7 frivolous and meritorious have been interchangeably used by
8 the courts. Basically, it's one that -- that the -- in that
9 case -- legal claim, that would be the D.A. would have
12:12:46PM 10 provided him with some type of relief or enter some type of
11 plea with him. At no time is there any record suggesting that
12 in this case, Judge.

13 And, lastly, the harm done to the plaintiff, none
14 of the conduct by my clients any of -- none of their conduct
12:13:04PM 15 caused him harm. Their conduct individually. That's my
16 point. Whether there's a issue of a fact about his mail being
17 delayed or not, I know -- we know for a fact by the proof in
18 the record before the Court that none of that was done by any
19 of these individual clients.

12:13:25PM 20 Based on that he fails to meet any of these
21 elements by a preponderance of the evidence. That's the
22 second point, Judge.

23 The third and final basis for my motion for
24 judgment is that no -- that no reasonable public officer in my
12:13:50PM 25 clients' positions would have thought that their conduct or

1 omissions would have been a constitutional violation of
2 Mr. Livingston's rights.

3 There hasn't been -- there's just no proof other
4 than the mere fact that these three individuals held a
12:14:19PM 5 supervisory position at the facility, none had personal
6 involvement, none of them actually did the conduct that he's
7 alleging to have occurred, which is actually pretty unclear
8 other than in a conclusory speculative way he states that his
9 mail was withheld.

12:14:39PM 10 Well, even so, he hasn't proven that these folks,
11 any of my clients did just that. Therefore, I respectfully
12 request judgment as a matter of law as to these three
13 individuals. Thank you, Judge.

14 **THE COURT:** Thank you. Mr. Livingston?

12:14:59PM 15 **MR. LIVINGSTON:** Yes. I didn't expect them to get
16 on the stand and say yes, we did it and I don't think anybody
17 here expected them to say we did it, but the evidence showed
18 that mail from the court was denied, was delayed for extended
19 period of time and because of that delay that I couldn't
12:15:28PM 20 respond to what the court wanted.

21 Numerous directives that they -- that they suppose
22 to be they policies and procedures states that the supervisory
23 is responsible for anything that goes wrong and in the mail
24 room.

12:15:50PM 25 And -- and the evidence shows that that letter of

1 July 6th was not given to me until three weeks after the
2 deadline. I don't know how they know when the deadline was,
3 but they gave it to me three weeks after, exactly after.

4 And the evidence, the preponderance of the evidence
12:16:27PM 5 showed that I was denied access to the courts. And numerous
6 cases that states that when a prisoner claims that he was
7 injured by prison officials in efforts to defend or pursue
8 other relevant legal claims, then he was denied access to the
9 court.

12:17:04PM 10 And I was -- I was obviously prevented from showing
11 or submitting and submitting the evidence that the Court
12 requested and according to they -- according to that specific
13 court ruled, it said that's a dismissal of the petition would
14 occur if these documents are not submitted per they rules.

12:17:39PM 15 Because of the delay of the -- that letter, the
16 July 26th letter, that's exactly what happened. When
17 Ms. Kaye -- what she wrote in her decision, the reason to me
18 why she said that because she couldn't identify what I was
19 talking about because these documents was missing.

12:18:02PM 20 And she needed the document to substantiate the
21 law, the question of law I was stating and submitted in my
22 leave application.

23 And the leave application is -- is meritorious --
24 it had merit because it was seeking to overturn a decision
12:18:38PM 25 from the lower courts from the Appellate Division.

1 And the judge couldn't do that without the initial
2 submissions. And these defendants are responsible. Can you
3 see they were the supervisors, they might have actually
4 handled the thing, the letter, and nobody expected them to get
12:19:07PM 5 on the stand and say we did it, you know, given the money and
6 all that.

7 I think Your Honor should deny the motion and let
8 the jury decide.

9 **THE COURT:** Thank you very much. Regarding this
12:19:25PM 10 matter, the plaintiff alleges that he was denied his access to
11 the courts in violation of the United States Constitution.

12 In order to prove his claim he must prove certain
13 elements by a preponderance of the evidence including, first
14 of all, that he was denied access to the courts. In this
12:19:45PM 15 case, by the intentional holding back of certain legal mail.

16 And, secondly, that the acts were done by the
17 defendants under color of law.

18 Third, that the defendants' conduct hindered
19 plaintiff's efforts to pursue a meritorious legal claim.

12:20:08PM 20 Fourth, that the case which the plaintiff wanted to
21 bring to court was not frivolous.

22 And five, that the plaintiff was, in fact, harmed
23 by the defendants' conduct.

24 The defendants Gates, Bills and Whitten all
12:20:27PM 25 testified, called by the plaintiff in this particular case.

1 Regarding the defendant Whitten, there's no evidence that she
2 had any involvement whatsoever in the handling of any mail,
3 let alone the plaintiff's mail in this particular case.

4 There needs to be proof of intentional acts, there
12:20:51PM 5 is no testimony that she in any way had any policy or
6 procedures that intentionally deprived the defendant of his
7 right to receive his legal mail in a timely fashion.

8 And, therefore, the Court does grant the judgment
9 as a matter of law regarding the defendant Whitten and
12:21:10PM 10 dismisses the cause of action against her.

11 Regarding the defendant Bills, the same situation
12 exists. He was acting as a supervisor overseeing the mail
13 room, but there's no testimony he had any permanent
14 involvement or in any way acted in an intentional manner to
12:21:29PM 15 deprive the defendant of his access to courts by denying him
16 proper timely receipt of his legal mail.

17 And, therefore, the Court finds that the jury
18 cannot find against the defendant Bills, and the Court will
19 grant the judgment as a matter of law regarding the defendant
12:21:47PM 20 Bills and dismiss that matter as well.

21 The remaining defendant Renee Gates indicated she
22 was a supervisor in the mail room, but did indicate on
23 occasions that she did handle mail, did not recall
24 specifically whether or not she could or might have handled
12:22:06PM 25 Mr. Livingston's mail, particularly the mail that's the

1 subject of this particular litigation.

2 I think the testimony is sufficient for the jury to
3 determine whether or not there was a -- clearly a delay in
4 this particular mail. There's proof that it was postmarked
12:22:28PM 5 through a Pitney Bowes postmark from July 26th, was ultimately
6 received by Mr. Livingston on August 17th, although it
7 indicates received on August 17th, I think the testimony
8 raises several issues regarding that.

9 In particular, what happens with mail when someone
12:22:52PM 10 is out to court? This particular envelope was marked OTC,
11 later crossed off and appeared that then a cell location of
12 the defendant was placed on that particular envelope.

13 There was testimony I think from Ms. Gates as well
14 that indicated that the procedure was to put on a stamp as
12:23:14PM 15 soon as it's received, but not that that was always done or
16 there could be times where that had not been done.

17 Therefore, I believe there's issues of fact for the
18 jury regarding the involvement of Ms. Gates in this matter and
19 deny the motion under Rule 50 for a judgment as a matter of
12:23:34PM 20 law regarding the defendant Renee Gates, but the other two
21 defendants will be dismissed.

22 Are you going to present any evidence?

23 **MR. BENITEZ:** No, I'm not, Judge.

24 **THE COURT:** Are you both prepared to do closing
12:23:56PM 25 statements then? Advise you of the charge?

1 **MR. LIVINGSTON:** I'd like to make a motion to move
2 for directed verdict on the issue.

3 **THE COURT:** Directed verdict?

4 **MR. LIVINGSTON:** Yeah, directed verdict -- a
12:24:17PM 5 direct -- let me see -- directed verdict judgment
6 notwithstanding the verdict after trial.

7 **THE COURT:** It's not the time to make that motion?

8 **MR. LIVINGSTON:** Excuse me?

9 **THE COURT:** It's not the appropriate time to make
12:24:35PM 10 that motion.

11 **MR. LIVINGSTON:** I thought after that's the time to
12 do it when all evidence is --

13 **THE COURT:** What rule are you referring to?

14 **MR. LIVINGSTON:** I don't know the rule, but --

12:24:47PM 15 **THE COURT:** What are you reading from?

16 **MR. LIVINGSTON:** I'm reading from a trial
17 techniques book. It says after evidence is closed, permit
18 motion for directed --

19 **THE COURT:** You're alleging there's no issue of fact
12:25:11PM 20 and the Court should direct the verdict in your favor?

21 **MR. LIVINGSTON:** Yes.

22 **THE COURT:** Okay, denied. Anything else?

23 **MR. LIVINGSTON:** No.

24 **THE COURT:** There are clearly issues of fact for the
12:25:21PM 25 jury to decide in this matter.

1 **MR. LIVINGSTON:** Okay.

2 **THE COURT:** Okay. So you'll be ready for summation.

3 I'm going to go through the jury charge at this time.

4 I will not charge the jury until tomorrow morning,

12:25:32PM 5 but we'll take a short break, then we'll do summations.

6 The Court will instruct the jury on province of the
7 jury and the Court.

8 Indicate that the evidence in the case consists of

9 the sworn testimony of witnesses, any exhibits received in

12:26:01PM 10 evidence and we'll review those exhibits prior to them being
11 submitted to the jury.

12 Any statements and arguments of counsel are not
13 evidence.

14 If there's an objection to a question sustained by

12:26:14PM 15 the Court, they're to disregard that question.

16 They're to consider only the evidence in the case.

17 I'll explain to them the difference between direct
18 and circumstantial evidence.

19 I'll indicate to them the questions are not

12:26:32PM 20 evidence in and of themselves.

21 That their recollection does control.

22 In this case I did ask witnesses questions, I did

23 so only to enlighten the jury regarding particular issues and

24 they should not view that as giving any indication I have any

12:26:53PM 25 opinion on a fact issue which is solely within their

1 determination.

2 I made rulings on objections and motions during the
3 course of the trial. Again, that was based solely on the law.
4 That should cause them to make no inference that I have any
12:27:10PM 5 opinion regarding the credibility of the testimony.

6 I'll instruct the jury, too, that the burden of
7 proof in this case is that the plaintiff must prove the case
8 by a preponderance of the evidence. I will define for the
9 jury preponderance of the evidence.

12:27:32PM 10 I'll instruct them that it will be up to them to
11 determine the credibility of the witnesses' testimony, provide
12 them various testimony which could be utilized to determine
13 the credibility of witnesses, including any inconsistencies --
14 I'm sorry, inconsistencies, any prior inconsistent statements
12:27:51PM 15 as well.

16 I'll instruct the jury that all available evidence
17 need not be produced.

18 I'll instruct the jury they can consider the
19 interest of a witness, any bias or hostility a witness may
12:28:09PM 20 have.

21 Regarding cause of action, there's one cause of
22 action, specifically denial of a prisoner's access to courts.

23 The Court will indicate that the acts of the
24 defendant, the only remaining defendant, Renee Gates,
12:28:33PM 25 particular rights under the Constitution of the United States.

1 The plaintiff alleged that he was deprived of his
2 rights under the First Amendment of access to the courts.

3 To succeed in his claim of denial of access to
4 courts, he must prove by a preponderance of the evidence the
12:28:53PM 5 following elements:

6 One, that the defendant did deprive him of access
7 to the courts by intentionally holding back his legal mail,
8 and I will define "intentionally."

9 Second, the defendant acted under color of law.

12:29:10PM 10 Third, that the defendant's conduct hindered his
11 effort to pursue a meritorious legal claim.

12 Fourth, the case which the plaintiff wanted to
13 bring to court was not frivolous.

14 And, five, the plaintiff was harmed by the
12:29:24PM 15 defendant's conduct. If the plaintiff has proved each of
16 these elements by a preponderance of the evidence, they should
17 find for the plaintiff and consider the issue of damages.

18 On the other hand, if they find the plaintiff has
19 failed to prove any one of the elements by a preponderance of
12:29:41PM 20 the evidence, they should find for the defendant.

21 I will instruct the jury that they are to consider
22 damages. I'll charge them on the law related to damages.
23 However, I will instruct them on the fact that my charging
24 them on the issue of damages is not to be taken as an
12:30:08PM 25 indication that they should find for the plaintiff. They have

1 to find first that the plaintiff has proved his case by a
2 preponderance of the evidence.

3 I'll instruct the jury that their damages must be
4 reasonable. Any damages must have been proximately caused by
12:30:25PM 5 the actions of the defendant.

6 I will instruct the jury regarding compensatory
7 damages, nominal damages. I do not believe there's sufficient
8 evidence to instruct the jury on punitive damages and decline
9 to do so.

12:30:53PM 10 I will instruct the jury that the verdict must be
11 unanimous.

12 That they are to consider all the evidence in the
13 case, discuss the case among themselves, that their verdict
14 should not be in any way based upon the party's race,
12:31:14PM 15 religion, national origin, sex or age.

16 I will provide them with various rules they must
17 abide by during their deliberations.

18 That they can consider their notes. If they need
19 readbacks of any testimony or law, that can be provided to
12:31:31PM 20 them.

21 If they want any of the exhibits received in
22 evidence, they can receive those.

23 The Court will appoint juror number 1 as the
24 foreperson of the jury.

12:31:43PM 25 Indicate that the foreperson if and when the jury

1 does reach a unanimous verdict, will return to court and
2 report the verdict in open court.

3 Mr. Livingston, do you have any exceptions or
4 requests?

12:32:02PM 5 **MR. LIVINGSTON:** Yeah, I like you to give a charge
6 about not being prejudiced about the officers, you know, in
7 the courtroom.

8 **THE COURT:** The fact you're in custody?

9 **MR. LIVINGSTON:** Yes.

12:32:16PM 10 **THE COURT:** Yes, I will do that.

11 As I raised at the side bar, I'm a little concerned
12 about one of the exhibits that you asked to be received in
13 evidence and have received which outlines your underlying
14 crime because it does involve a robbery and a murder.

12:32:49PM 15 And that's very well-articulated within that
16 document. I think it's a writ of error coram nobis.

17 You indicate you understood that and you knew that.
18 I don't know if you want me to fashion any charge related to
19 that or not.

12:33:05PM 20 **MR. LIVINGSTON:** Yeah. Yeah, you know better than
21 I do, yes. Yeah, you know, if it comes a point because they
22 gonna learn about it anyway because I might speak about it and
23 say something about it. So it's already in the document, so I
24 might reading it, but if you have something to say about it, I
12:33:28PM 25 wouldn't mind.

1 **THE COURT:** Well, I will instruct -- I will come up
2 with some type of instruction and I'll prepare that and read
3 it to you before I give it to the jury. I think they need to
4 be instructed somehow to disregard that. I don't want that to
12:33:43PM 5 overwhelm their discussions here. It's really not relevant.

6 Anything else?

7 **MR. LIVINGSTON:** No.

8 **THE COURT:** Mr. Benitez?

9 **MR. BENITEZ:** I note the Court mentioned they were
12:33:56PM 10 to define the term "intentional." Just wanted to make sure,
11 is that going to be consistent with the Western District?

12 **THE COURT:** Consistent with what?

13 **MR. BENITEZ:** I just wanted to know what the
14 definition would be.

12:34:08PM 15 **THE COURT:** Sure. An act is intentional if it is
16 done voluntarily and deliberately and not because of mistake,
17 accident, negligence or other innocent reason. Please note
18 that intent can be proved directly or can be proved by
19 reasonable inference from circumstantial evidence.

12:34:24PM 20 **MR. BENITEZ:** Thank you, Judge.

21 **THE COURT:** Is that sufficient?

22 **MR. BENITEZ:** I have no exception.

23 **THE COURT:** All right. With that why don't we take
24 a five minute recess or so and then we'll come in and bring
12:34:33PM 25 the jury in, we'll do summations.

1 **MR. LIVINGSTON:** Summation today?

2 **THE COURT:** Summations today, we do summations
3 today, we're going to recess, reconvene at 8:30 tomorrow
4 morning, I'll charge the jury then, okay? Thank you.

12:39:57PM 5 (WHEREUPON, there was a pause in the proceeding.)

6 **MR. BENITEZ:** Judge, may I have Ms. Gates sit next
7 to me at the table?

8 **THE COURT:** Sure, absolutely.

9 **MR. BENITEZ:** Thank you.

12:40:07PM 10 **THE COURT:** Again, I will instruct the jury that at
11 this point the only remaining defendant is the defendant Renee
12 Gates and they're not to speculate as to that, okay? Thank
13 you. Ready?

14 **MR. BENITEZ:** Yes, Judge.

12:40:21PM 15 **THE COURT:** All right, bring the jury out.

16 (WHEREUPON, the jury is present.).

17 **THE COURT:** Members of the jury, at this time the
18 proof has been closed, you're about to hear the summation of
19 the parties. You should know that during their submissions
20 the parties will make certain inferences and conclusions which
21 they believe may be properly drawn from the evidence. That's
22 the purpose of the summations.

23 However, it's entirely up to you to determine the
24 evidence in the case. You are the sole judges of the facts in
12:42:09PM 25 the matter.

1 Any statements of counsel is not evidence. You
2 decide what the evidence is. Just so you know for planning
3 purposes, we're going to hear the summation of counsel at this
4 time, and then we're going to recess until tomorrow morning.
12:42:21PM 5 We'll reconvene at 8:30 tomorrow morning and at that time I
6 will instruct on the rules, the law and the principles that
7 will guide your deliberations.

8 With that understanding, summation of counsel at
9 this time.

12:42:33PM 10 **MR. BENITEZ:** Thank you, Judge.

11 **THE COURT:** Mr. Benitez.

12 Before we begin, members of the jury, at this time
13 there remains one defendant in this case. Regarding the
14 defendant, please don't speculate as to why the other two
12:42:55PM 15 defendants have been -- are no longer part of the case. Thank
16 you.

17 **MR. BENITEZ:** As it may please the Court, the jury,
18 ladies and gentlemen, first I'd like to take the opportunity
19 to thank you for your time and attention in this matter. Some
12:43:13PM 20 folks that may be -- may be questioning as to why certain
21 questions were asked or they weren't asked or why some
22 testimony was allowed and some was not allowed.

23 Rest assured, we did our best to make sure that you
24 have a picture of what this case was about.

12:43:35PM 25 What we have here today, as I stated in my opening,

1 is quite simple: To the point, what we have here is a case
2 that's diametrically opposed. We have a plaintiff who is
3 alleging a very complex conspiratorial case and from our
4 perspective this is, as I stated in my opening, very simple
12:44:10PM 5 and straightforward.

6 The facts and the evidence and the proof will lead
7 you to believe and accept the credible evidence in this case,
8 will lead you to accept the fact that Ms. Gates had no
9 personal involvement in some constitutional violation of the
12:44:30PM 10 plaintiff in this case.

11 We're talking about an incident that happened over
12 nearly eight years ago, eight years ago in 2013 -- this
13 happened back in August 17th, 2006 at Elmira Correctional
14 Facility.

12:45:05PM 15 What we're going to talk about is a number of
16 things. But, most importantly, the proof and the evidence
17 and lack thereof.

18 What's startling to me is -- well, we have a number
19 of things. One of the most important things I think is that
12:45:27PM 20 what motivation would Ms. Gates have had to do what the
21 plaintiff alleges she did?

22 Now, what is the conduct that he's alleging? He's
23 alleging that there was a letter that was sent by the New York
24 State Court of Appeals from the capital, Albany, New York to
12:45:51PM 25 Elmira Correctional Facility and that was in an envelope.

1 Remember the testimony, the credible evidence here, no one
2 knew the contents of that envelope.

3 No one did other than the person who wrote it and
4 the recipient, which would be Mr. Livingston.

12:46:15PM 5 The practice -- based upon the practice and the
6 knowledge of Ms. Gates during the time of August of 2006, was
7 very clear and it was reiterated by Mr. Bills and by
8 Ms. Whitten, it's undisputed what the process is. Mail comes
9 in, it's filtered, there's three types of mail and the
10 priority is always given to the legal mail.

11 Legal mail is simply stamped, put in a bag, set
12 aside. Then they deal with the rest of the mail and I'm going
13 to talk about the rest of the mail.

14 And believe me, you're going to be asked during
12:47:10PM 15 questions in the instructions and I want you to remember
16 especially what I said in my opening, the plaintiff is not
17 going to be able to meet the burden of proof for each of the
18 five elements. I'm not going to instruct you on those
19 elements, but I want you to remember at least one point that I
12:47:29PM 20 said in my opening, which was he's not going to be able to
21 show or prove any of the elements, number one, but most
22 importantly, that Ms. Gates intentionally withheld a letter
23 from the Court of Appeals for over three weeks.

24 The testimony was very clear. She stated when she
12:47:56PM 25 looked at the writing, what was the procedure? They get it,

1 they put it -- they date stamp it, put it in the mail, then
2 the person, there's a mail clerk -- there's a mail clerk that
3 puts in the cell location of that inmate. I-2-A, whatever it
4 was on the exhibit.

12:48:13PM 5 And that writing -- what was Ms. Gates' testimony
6 about that writing? She recognized it that it was not hers,
7 it was not her writing, that the person who wrote that was the
8 one that handled his legal mail.

9 There is no personal involvement by Ms. Gates in
12:48:33PM 10 this case. We're talking about a career professional, State
11 professional, she testified over numerous years of public
12 service. Her first time on the stand in a federal courtroom.
13 I'm flabbergasted.

14 You know, my client here has nothing to gain,
12:49:13PM 15 nothing to gain other than to get rid of this gray cloud over
16 her that's been lingering for how many years now? From 2006
17 to now, and hopefully vindication, and that's where I'm asking
18 each and every one of you to come back quickly with a no
19 cause. I mean, not -- you can't find Ms. Gates liable for
12:49:40PM 20 this act, for this situation.

21 What do we know the credible evidence shows? The
22 plaintiff he testified, he testified that he on multiple
23 occasions filed appeals regarding his underlying conviction.
24 And what was the basis of his underlying appeals? Not that he
12:50:11PM 25 didn't do it, not even the gall to even mention that.

1 But it should be overturned why? For procedural
2 reasons. Procedural reasons not dealing with the substance of
3 the underlying crime of which I'm not going to get into.

4 And then the plaintiff, what does he do up on the
12:51:00PM 5 stand? He tries to explain to you the thought process of the
6 Court of Appeals. He wants to step into the mind of Chief
7 Judge Kaye and tell you that it was because he didn't have
8 this opportunity to submit additional evidence which was
9 optional. It wasn't obligatory. You can look at the letter
12:51:24PM 10 from the judge. It was not -- first of all, he didn't have
11 the right to appeal. He had to seek permission from the court
12 to appeal.

13 That's a discretionary function. And the judge,
14 her decision, which he has marked in one of his exhibits, is
12:51:46PM 15 page 2, which if you recall I was the one that brought it into
16 the exhibit, and that document what does it state? I'll pull
17 it up for you. Excuse me.

18 This is Plaintiff's Exhibit No. 22, this is a
19 letter from the Court of Appeals dated August 28th, 2006, and
12:52:13PM 20 in there it incorporates the Court's decision and in this
21 decision the certificate denying leave, denying him the
22 permission, denying him permission to file another appeal
23 after multiple appeals.

24 Here we go. The critical piece there, the judge
12:52:57PM 25 upon the record and proceedings herein, there is no question

1 of -- question presented which ought to -- ought to be
2 reviewed by the Court of Appeals and permission to appeal is
3 hereby denied. Speaks for itself.

4 All right. That's pursuant to law. It's not
12:53:27PM 5 because your mail was delayed. It wasn't because -- I don't
6 know, anything one could argue, I suppose.

7 It wasn't because of a violation of some court rule
8 that he was trying to state earlier. That if you don't submit
9 these records, remember that testimony? He was saying if you
12:53:52PM 10 don't hand in these records, then the Chief Clerk of the Court
11 will dismiss the case.

12 Guess what? Who dismissed -- there was no
13 dismissal, number one. There was no dismissal. This is a
14 denial, number one.

12:54:10PM 15 A denial for him -- for him to not bring another
16 appeal as a matter of law. That's what this issue is about.
17 It's not a dismissal, number one. And number two, he
18 submitted a 13 page application to the Court which was typed,
19 dense, he cited the transcript, it was in-depth. It's in
12:54:34PM 20 there somewhere, I'm not going to go into it all, feel free to
21 look at it if you like.

22 But, honestly, everything he had to say was in
23 those 13 pages of typed written letter. Any judge is going to
24 make that determination right away.

12:54:54PM 25 Here who denied the leave? It wasn't -- it was the

1 Chief Judge Kaye, she denied the leave. The Court of Appeals,
2 by the way, is the highest court in New York State.

3 The plaintiff's testimony is so clear on this
4 point, he's become rather proficient about the law. He told
12:55:36PM 5 you in his federal case, oh, yeah, you better believe it, I
6 told the judge, I told the Court I had real basis because the
7 peremptory challenges, peremptory challenges. Remember he
8 explained to you peremptory challenges, that you get to strike
9 certain jurors off and on and off if you don't like them and
10 whatever?

11 Whoa. That's a big basis to overturn a conviction.
12 But that's the type -- that's the reasoning that goes on
13 through this type of case, which is an absurdity.

14 What do we have here in terms of Ms. Gates? A
12:56:16PM 15 career public servant acting in ordinary course of business
16 like you would, like anyone would in the performance of their
17 job.

18 And what does the plaintiff want from you? To hold
19 her liable where there has been no proof that she was actually
12:56:38PM 20 the person that handled his mail, number one.

21 Let alone that she intentionally withheld his mail.
22 Quite the contrary. All the testimony and the proof shows is
23 that letter, it was postage stamped on July 26th, 2006. We
24 all agree. I'm not -- that's the simple part of the case.

12:56:57PM 25 Postage stamp July 26th, 2006.

1 Pitney Bowes is a private scanner. That's all that
2 is. It's not from the U.S. Postal Service, no one's been able
3 to establish that.

4 No one's been able to establish it even when it
12:57:13PM 5 arrived at the U.S. Postal Service for them to process.

6 For all I know, we could all speculate, could have
7 been, you know what? It's in the summertime, it could have
8 been a college intern working with the New York State Court of
9 Appeals, God forbid, but that may happen. Someone forgot to
12:57:30PM 10 put it in the mail. That's a possibility.

11 I'm not telling you that's not -- that happened.
12 But the reality is the testimony from all three of my clients
13 was they don't know. They don't know from July 26th to
14 August 17th, they don't know what happened in that timeframe.

12:57:54PM 15 Guess what? Neither does the plaintiff.

16 Very complicated. But what did he testify on the
17 stand? He testifies he wants you to believe it was more than
18 just coincidence that the Chief Judge from the Court of
19 Appeals signed that denial on August 17th, 2006, the very same
12:58:17PM 20 date that the facility received the letter and he received the
21 letter the same day both days.

22 I don't know what that really means. He wants you
23 to kind of take a leap of faith that there was some conspiracy
24 perhaps with the Court of Appeals and Ms. Gates. Maybe Judge
12:58:43PM 25 Kaye called Ms. Gates up and said guess what? I want to play

1 a game on Mr. Livingston. I mean, I hope what I'm telling you
2 is so far-fetched that no reasonable person can come here and
3 say that Ms. Gates did anything unconstitutional, anything
4 wrong.

12:59:08PM 5 If there was anything wrong, it was the fact that
6 something happened with that mail. We don't know. But if
7 there's anything wrong, it's the fact that we're here. That
8 we're here. My client has nothing more to prove in this case.

9 If she didn't do something wrong, how do you prove
12:59:29PM 10 a negative? I can't come here and tell you -- I showed you
11 all the records, it's simple from our perspective. It arrived
12 on August 17 and it was given to him on August 17. That's it.

13 That's our defense. You know, I hope you accept
14 that. There's nothing more to that.

12:59:51PM 15 You know, because we can't disprove. I can't call
16 the U.S. Postal Service Inspector General's Office to do a
17 federal investigation into how and why his letter took three
18 weeks to get to the facility.

19 I just don't have that authority.

01:00:23PM 20 You know, just before I wrap up here, I just -- the
21 other thing is what would be the motivation for a career
22 public servant to do a heinous act of holding something back?
23 We didn't hide a thing here.

24 You know, there's -- there was testimony here, he
01:00:53PM 25 filed a grievance. Guess what? He brought something to the

1 attention of the facility and guess what? What did the
2 facility do? They looked at it and said, you know what? You
3 got a point, I want every inmate at Elmira Correctional
4 Facility to have the benefit of a daily review on these out to
01:01:12PM 5 court mails.

6 So he actually won something, it was a good thing.
7 We didn't hide under the carpet or something here or under the
8 rug, no.

9 Just finally, I want to make sure you understand
01:01:30PM 10 this. This lawsuit is against Ms. Gates individually, it's
11 not against New York State. It's not against New York State.
12 It's a 1983 case that's against her individually. So if
13 there's a judgment or there's a decision or something that's
14 adverse, it goes to her reputation, to her person.

01:02:05PM 15 You know, Mr. Livingston has had more than one bite
16 at the apple. Multiple times. Multiple times at the apple of
17 overturning his appeal. He's had various judges looking over
18 this. And he would like you to believe that all these judges
19 that sit on these appellate divisions and the lower courts,
01:02:29PM 20 that each one of these judges rubber stamped another lower
21 court decision without reviewing the record.

22 No. He's not qualified to say that.

23 Now, at the end of the day there is no motivation
24 here. No motivation for her, number one.

01:02:58PM 25 Plaintiff's case is just simply incredible for him

1 to be able to point the finger at Ms. Gates. He can't point
2 the finger at Ms. Gates. He himself testified he doesn't
3 know. He can only speculate.

4 We can all speculate. Speculation is not enough.
01:03:20PM 5 It's just not.

6 There was a lot of testimony he's a convicted
7 felon, we understand that, fine. And, again, that may or may
8 not go into the issue of credibility. That's up to you. I'm
9 not -- I never hammered away on that. I'm leaving that up to
01:03:44PM 10 you. Give him a fair shot, give everyone a fair shot here.
11 But you know what? You can think about those things if you
12 like. Those issues, you weighing the credibility of the
13 witnesses, all of the witnesses, you can. The judge will
14 instruct you on all of that.

01:04:04PM 15 But in conclusion, in conclusion here, my client
16 Ms. Gates, regarding the defendant, wants you to know that
17 this is a very serious matter for her. She's the one on the
18 hot seat. All right? For over six years, okay?

19 For us, we might think this is not a big deal, but
01:04:32PM 20 I want you to -- we want you to know that this is a very
21 serious matter.

22 That ultimately you're going to maybe have to weigh
23 these, the differences between these diametrically opposed
24 versions of events and reject the other one's claims. You
01:04:55PM 25 might have to reject one party's over the other. He's

1 claiming something; we're saying this is our defense, this is
2 what we did.

3 And it may depend on credibility. So I ask you to
4 weigh all the things that you bring into this courtroom on
01:05:10PM 5 your own, the things that you learn outside and what you learn
6 from the court in weighing the credibility of the witnesses.

7 You know, I suspect that Mr. Livingston will be
8 seeking money damages. But the most troubling thing about
9 that is the fact that this case is even before you and
01:05:36PM 10 obviously he has a captive audience. He has a captive
11 audience, the jury, eight wonderful gentlemen and ladies of
12 the jury, myself, officers of the court, resources. He has a
13 captive audience. You know, that's really amazing.

14 And not only just that, but it's a personal affront
01:06:02PM 15 to Ms. Gates.

16 **THE COURT:** Ladies and gentlemen, I'm going to ask
17 you to disregard that.

18 Mr. Benitez, keep --

19 **MR. BENITEZ:** Thank you, pardon me, Judge.

01:06:18PM 20 Here, my client, Ms. Gates, has nothing to gain
21 other than vindication. Based on all of the credible evidence
22 in this case, I respectfully request of each one of you to
23 come back with the unanimous verdict on her behalf, dismissing
24 this claim against her. And then you provide her -- provide
01:06:40PM 25 the plaintiff with zero amount of damages. I thank you very

1 much for your time and your energy throughout this period of
2 time. Thank you very much.

3 **THE COURT:** Thank you. Mr. Livingston?

4 **MR. BENITEZ:** Thank you, Judge.

01:07:03PM 5 **THE COURT:** You may proceed.

6 **MR. LIVINGSTON:** Good afternoon. After that I
7 don't know where to start, but I'll start by saying America is
8 a great country to have me to be able to stand up in front of
9 you and saying these defendants violated my right and
01:07:33PM 10 hopefully you all can fix it or help me fix it, and other
11 places you can't do that.

12 So I thank you, the forefather and whoever helped
13 to develop the system, for that.

14 First of all, I want to answer some things that he
01:08:02PM 15 said. He say, basically, he saying how a innocent person, how
16 would a innocent person attack they conviction. They say, you
17 know, I'm innocent, I'm innocent.

18 But how would a innocent person get convicted in
19 the first place? It had to be something went wrong in the
01:08:25PM 20 procedure and that's all I attacked during my litigations.
21 Something happened in the procedures. They did something
22 wrong when they wasn't supposed which violated my
23 constitutional right to a fair trial. Every chance I got, I
24 pointed out to them what it was. And every chance is always
01:08:50PM 25 something extraordinary that took place why I'm still here and

1 in front of you. Every chance, every turn I made something
2 extraordinary happened.

3 He's saying -- another thing he said, he said
4 denial is a dismissal. He playing semantics? It mean the
01:09:14PM 5 same thing. They got dismissed or it got denied. Same thing.

6 And who is to say that somebody didn't read that
7 letter while they have it in they possession. For 22 days
8 they had in possession. Who to say they didn't read it?

9 And there's evidence or circumstantial evidence
01:09:36PM 10 which you can infer that somebody read it because the letter
11 arrived, it was dated, excuse me, July 26th, 2006. And in
12 that letter -- let me grab it for you -- it was marked
13 Exhibit No. 5, it's in evidence if you want to read it.

14 In that letter it states in pertinent part
01:10:08PM 15 additional submissions, if any, must be mailed within three
16 weeks after the date of this letter. So it gave specific
17 time.

18 Some of you all like math. There's no hard algebra
19 or calculus or trigonometry to figure out three weeks from
01:10:33PM 20 July 26th is around August 16th, 17th. And boom! You got the
21 date that I was given the letter. All they had to do was
22 check. You see that they received that letter, they say we
23 gonna hold it for three weeks and they gave it to me three
24 weeks.

01:10:59PM 25 I don't know why. But the result was me being

1 denied access to the court. Another thing he said, he said my
2 grievance fixed the problem. Yes, it did. Maybe it would
3 went to another person. That would be good, especially if
4 it's a good person.

01:11:26PM 5 But that fixing ain't doing me no good. Only you
6 can do me some good by ruling in my favor.

7 Another thing he said, he say this thing is not
8 against the State. He's a State employee. He work for the
9 State. He represent the State. So this is a State issue.

01:11:56PM 10 That's if you people choose to give me money,
11 that's who is going to pay.

12 **MR. BENITEZ:** Objection, Your Honor. That's a
13 misstatement of facts. The law is clear this is against an
14 individual, Judge.

01:12:09PM 15 **THE COURT:** Ladies and gentlemen, please disregard
16 the last remark by the plaintiff.

17 **MR. LIVINGSTON:** I wasn't prepared to make this
18 summation right now because I didn't expect it to be over this
19 soon and you ready to make the summations in court. But so I
01:12:35PM 20 put something together, you know, in case.

21 Like I said before, a lot of extraordinary things
22 that happened to me or innocent person to get convicted of a
23 crime. A lot. In my case, a lot did occur.

24 If I remember correctly, this crime you gonna read
01:13:05PM 25 the specifics in some of the exhibit that I put in evidence.

1 I don't mind. I have nothing to hide about that.

2 But on December 11th, 1982, they said I committed
3 this crime. And for three and a half years nobody came and
4 checked me, said did you commit this crime? You under arrest.
01:13:36PM 5 I was living where I live. They knew where I live.

6 So in 1986 they had this crackhead person, I don't
7 know if you know what a crackhead is, but they had this
8 crackhead person come to court and say, "yeah, he did it."
9 For whatever reason she probably had a reason. Probably
01:14:03PM 10 trying to save herself or whatever. Right?

11 So they finally arrested me after three and a half
12 years of a criminal. And then I don't know if -- if the jury
13 believe her, what she said, but during the trial they
14 literally laughed at her, laughed at what she was saying.

01:14:31PM 15 That's the -- that's one of the first extraordinary
16 thing that happened in the case.

17 Then the second extraordinary thing this person
18 named Duane Cook, he was a co-defendant, I don't know where he
19 came from. After the judge threatened him that he was going
01:14:53PM 20 to jail for how many times --

21 **THE COURT:** Mr. Livingston, I'm going to interrupt
22 you now. None of this is in evidence.

23 **MR. LIVINGSTON:** It is.

24 **THE COURT:** No, it's not.

01:15:01PM 25 **MR. LIVINGSTON:** It's in the record, it's in the

1 writ right there.

2 **THE COURT:** Is there a transcript of the trial?

3 **MR. LIVINGSTON:** Yes, not a complete transcript,
4 but it's a transcript in the writ.

01:15:11PM 5 **THE COURT:** I'll allow a little bit of this. You're
6 not --

7 **MR. LIVINGSTON:** I wasn't going to put the whole
8 thing in there. But the other extraordinary thing that
9 happened in this case they -- the judge persuaded him, scared
01:15:24PM 10 him up to testify against me. He said he would. Then he
11 reneged on that, he didn't do it. He would have been lying
12 anyway.

13 So I thought I was good then. He's not gonna lie
14 on me, she can't really lie because they already laughed her
01:15:43PM 15 off the stand. And -- but the third extraordinary thing
16 happened when after he said he wasn't testifying when he was
17 testifying against me, the judge, the district attorney, and
18 my lawyer told the jury that he was gonna testify against me,
19 and the things that he will say. The things that they are
01:16:09PM 20 allege he would say would corroborate the crackhead person's
21 testimony.

22 But since he didn't testify, my Sixth Amendment
23 right to confront a witness was violated. I couldn't put
24 through what they already told the jury that he was going to
01:16:34PM 25 testify to.

1 So they had the corroboration with this person,
2 this person that didn't testify.

3 That's how I was convicted.

4 All right, when I was convicted I was shocked. I'm
01:17:01PM 5 like how the -- this happened, totally shocked. I ain't know
6 what to do next. When I stopped feeling sorry for myself, I
7 figured out, you know, that's people have constitutional right
8 to appeal. So that was my next move.

9 And I don't -- I would say that a innocent person
01:17:28PM 10 couldn't spend this much time in prison.

11 So like I was telling you before, a lady named
12 Ms. Finn, she took the case and she put those points of law in
13 the brief, inefficient evidence to convict and the three and a
14 half years indictment delay.

01:17:59PM 15 Now, the fourth extraordinary thing that occurred
16 to me being convicted was when Ms. Finn, she briefed those two
17 points, the fourth extraordinary thing she for some reason she
18 got -- she kicked off the case or just replaced or something
19 by another person, a Kevin Casey.

01:18:32PM 20 Then the fifth extraordinary thing was when Kevin
21 Casey came on my case, he disregarded the ineffective --
22 insufficient evidence to convict allegation briefing points of
23 law, just totally disregard that in a brief, changed the
24 pre-indictment delay to something more insignificant, speedy
01:19:02PM 25 trial. Changed that to speedy trial, right?

1 The Appellate Division, they affirmed it. I don't
2 know what it was because he was ineffective or because he
3 didn't argue what she put in there, but they affirmed it.

4 And after they affirmed it, I did -- he did a
01:19:40PM 5 application to leave, similar to what I did in the writ of
6 error coram nobis.

7 Then this what hurts me to what I don't know what
8 he did in the lower court because when he did the application
9 for leave, that's when I find out that he had left out those
01:20:02PM 10 two points and changed the other one, he left out the
11 significant -- insignificant evidence to convict and he left
12 out the -- that he changed the indictment delay to speedy
13 trial.

14 So when he did that, that was the fifth
01:20:25PM 15 extraordinary thing why I still in prison.

16 And it been uphill battle from then on. In 2006
17 before that I did numerous brief application appeals, try show
18 the court, including I did a error coram nobis regarding
19 Mr. Casey's ineffectiveness of leaving out those two issues.

01:21:15PM 20 So one day we was in Elmira and I'm in the law
21 library, I stay in the law library. So me and this person, we
22 use to -- a bunch of us really, we used to argue back and
23 forth and this issue came in and I told this person, Adam
24 Jameson, I had that issue and so he asked to see the minutes
01:21:38PM 25 and I showed him the minutes and he told me yeah, you got that

1 issue and it was strong issue.

2 So me and him put together that writ of error coram
3 nobis. I filed it in the court. I am to number 6, sixth
4 extraordinary issue that occurred is this issue right here
01:22:22PM 5 that we here today dealing with. I didn't get that letter
6 from the Court telling me -- said extra paper, the additional
7 papers.

8 The clerk sent the letter dated July 26th, '06
9 state that they wanted the papers and that the Judge Judith
01:22:59PM 10 Kaye was the assigned judge.

11 In one of the papers I'm alleging that the
12 withholding of that letter, July 26th letter, infringed on my
13 constitutional right to access the court where I could not
14 file with the Court of Appeals the papers that initiated the
01:23:30PM 15 writ of error coram nobis within the Appellate Division.

16 This is what the July 26th letter was saying.

17 And according to the rule of practice, if these
18 papers are not filed, petition will be dismissed. That's
19 exactly what happened. I didn't file it.

01:23:59PM 20 I agree that the Assistant Attorney General said,
21 he said this was a simple case. But he made it more difficult
22 because the defendant came about and told oh, we didn't
23 hold --

24 **MR. BENITEZ:** Objection, Your Honor, object. I'm
01:24:26PM 25 not a party to the case in this case.

1 **THE COURT:** Sustained.

2 **MR. LIVINGSTON:** The defendants got on the stand
3 and said, "well, I didn't withhold the letters." The evidence
4 showed it was withheld for 23 days -- 22 days, excuse me.

01:24:49PM 5 And then the letter arrived on August 17th, 2006,
6 after 22 days. I know the Postal Service is not like that.
7 Because the letter -- a letter from New York City from that
8 court, from Judith Kaye chambers arrived in Elmira from
9 New York City, it was mailed the post -- she -- the Bowes
01:25:19PM 10 stamp says August 24th, and then the Post Office postmark said
11 August 25th. It got to Elmira on the 28th.

12 Now, how come that letter from New York City took
13 only what? Three days. And then this letter, the most
14 important letter, took 22 days.

01:25:49PM 15 I'm like, man, something happened.

16 And then coincidentally, it matches up with the
17 prescribed deadline inside that letter. Three weeks. Matches
18 up. Three weeks.

19 On August 17th, 2006, the letter was stamped and on
01:26:19PM 20 August 17th, after Judge Judith Kaye didn't get my submission,
21 additional submission, she dismissed it on August 17th.

22 So somebody count real good.

23 I think the State established a real good --

24 **MR. BENITEZ:** Objection, Your Honor, the State is
01:26:58PM 25 not a party to the case.

1 **THE COURT:** Overruled. You may proceed.

2 **MR. LIVINGSTON:** They can't establish the
3 coincidentalness, that's the word. They can't explain how
4 these dates coincide like that, how it adds up to not just
01:27:27PM 5 Ms. Judith Kaye date, but also to the date that the deadline
6 was prescribed, the deadline that was the deadline.

7 Can't explain that away.

8 I know the explanation is circumstantial and you
9 must use the evidence that I put into evidence to infer what
01:28:01PM 10 that evidence establish.

11 It's simple, I think.

12 The evidence showed that the July 26th, 2006,
13 letter was held and delayed until August 17th. The evidence
14 showed that on August 17th, Court of Appeal deny my
01:28:28PM 15 application to leave -- to appear. And it also showed that
16 that was the deadline, three weeks that the letter inside the
17 envelope stated that was the deadline.

18 Now, these issues, it's not just important to me,
19 it's very important to me. But it's also important to you
01:29:14PM 20 because you are part of the public. And this could happen to
21 anybody. So it's a public interest for you to rule in my
22 favor because it will help the public.

23 For if they get away with this violation, they
24 probably never be stopped. And nobody else will probably try
01:29:43PM 25 to stop them.

1 And the way to make them stop is to find them
2 liable, grant me big damage award; or if not, the next time
3 these claims happen again there's no telling who they will do
4 it to. This is why this case is important to the public, not
01:30:07PM 5 just me.

6 I know jurors a lot of time don't like giving
7 prisoners money, I've seen it happen. I don't know why -- why
8 they say, why they do that, but it happens. But I'm not
9 going to stand here and say that, you know, it's a uphill
01:30:45PM 10 battle for me right now to convey the message that I want
11 conveyed and just probably because I'm a prisoner, you know,
12 they look -- people look at prisoners the way they have they,
13 you know, prejudice or bias or whatever.

14 So it's a uphill battle. I hope you gonna hold
01:31:16PM 15 that, put that aside and rule in my favor. This is not one of
16 those average prison litigation lawsuit. I'm not accusing
17 assault or excessive force or anything. This is -- this is --
18 this is bigger than that, I think.

19 Because it effect not just me, like I said, this is
01:31:53PM 20 a public interest case. Public will be very interested in
21 this.

22 As you know, I'm representing myself and I hope
23 that's another thing I hope you don't hold that against me. I
24 might have made a lot of mistakes and things like that, but,
01:32:39PM 25 you know, I'm not trained in things like that, but I have the

1 facts on my side and they can't be disputed.

2 They try, but they can't, they can't explain away
3 the facts.

4 The letter from the court was delayed for 22 days,
01:33:20PM 5 and that delay caused me a opportunity to file the papers in
6 court.

7 As I said, I'm not a lawyer, I'm not trained, I
8 could have did a lot of things, I probably could have brought
9 witnesses to -- on the stand and tell you how things is
01:33:51PM 10 done -- are done. But that didn't happen, so let's focus on
11 what happened.

12 I would like to bring your attention to the
13 exhibits.

14 **THE COURT:** Are you almost done?

01:34:37PM 15 **MR. LIVINGSTON:** No.

16 **THE COURT:** Well, you are. Five more minutes.

17 **MR. LIVINGSTON:** Five, all right.

18 I like to bring your attention to the exhibits and
19 I would like to have you look at them during your
01:34:54PM 20 deliberations because they explain a lot.

21 And you by using these exhibits, it will show that
22 my side of the story is the facts. I didn't make it up, try
23 to get paid, these is facts.

24 I want to get out of prison, I think it will take
01:35:29PM 25 some money and I hope you can help me out with that. Thanks.

1 **THE COURT:** Thank you. Ladies and gentlemen, at
2 this time we're going to recess until 8:30 tomorrow morning.
3 And in the meantime, I'd ask you not to discuss the matter or
4 allow anybody to discuss the matter with you.

01:35:49PM 5 Even though you've heard the evidence and the
6 summation of counsel, it's not the time to make up your mind
7 and please do not discuss it with anybody. The reason why
8 that's so important is you have to base your decision only on
9 the evidence you heard in this courtroom.

01:36:02PM 10 With that understanding, the jury may step down
11 until 8:30 tomorrow morning. Thank you.

12 **(WHEREUPON,** the jury was excused).

13 **THE COURT:** When we resume tomorrow, I'll also
14 confirm the exhibits to make we're sure all on the same page
01:36:40PM 15 regarding any exhibits that have been received, okay?

16 **MR. BENITEZ:** Okay.

17 **THE COURT:** With that understanding, we'll stand in
18 recess.

19 **MR. LIVINGSTON:** Can I ask you something?

01:36:48PM 20 **THE COURT:** Yes.

21 **MR. LIVINGSTON:** Was it a time restraint on my
22 summation?

23 **THE COURT:** Well, you were repeating yourself and
24 going over and over again the same thing. Sounded like you
01:36:58PM 25 were going through each of the exhibits, which would have been

1 repetitive. In addition, Mr. Benitez was about 22 or 23
2 minutes, you're already at 35 minutes. So quite a bit longer
3 than the other summation. Okay?

4 **MR. LIVINGSTON:** You saved me from myself.

01:37:14PM 5 **THE COURT:** I did? Why? I thought you were doing
6 pretty good. You were speaking well. Okay, we'll stand in
7 recess until 8:30, thank you.

8 **MR. BENITEZ:** Thank you.

9 (WHEREUPON, the proceedings adjourned at 1:39 p.m.)

10 * * *

11 **CERTIFICATE OF REPORTER**

12

13 In accordance with 28, U.S.C., 753(b), I certify that
14 these original notes are a true and correct record of
15 proceedings in the United States District Court for the
16 Western District of New York before the Honorable Frank P.
17 Geraci, Jr. on October 23rd, 2013.

18

19 S/ Christi A. Macri

20 Christi A. Macri, FAPR-RMR-CRR-CRI
21 Official Court Reporter

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